

Exhibit 6

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DROPLETS, INC.,

Plaintiff,

v.

12 CV 2326 (CM)

E*TRADE FINANCIAL CORPORATION,
et al.,

Defendants.

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New York, N.Y.
January 15, 2014
10:00 a.m.

Before:

HON. COLLEEN McMAHON,

District Judge

APPEARANCES

MCKOOL SMITH P.C.
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BY: COURTLAND REICHMAN
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Scottrade, and TD Ameritrade Defendants
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JESSICA L. MARGOLIS
MICHAEL B. LEVIN
BRIAN D. RANGE

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(Case called)

MR. REICHMAN: Good morning, your Honor. Courtland Reichman here, on behalf of Droplets. With me is Josh Budwin, to my right, and James Quigley. And behind me is Lauren Fornarotto. We also have representatives of our clients, Ingo Theuerkauf and David Berkerian.

THE COURT: We aren't set up so one side is at the front table?

MR. BUDWIN: The way the media was set up, we're going to have to share across the table.

THE COURT: Everything is totally backwards. First of all, the plaintiff is always to my left. The plaintiff should be at the front table. We have the plaintiff at the right and only half of the front table. Don't blame me if I get you all screwed up because I've been doing this for 18 years the same way. Plaintiffs are on the left and in the front.

Defendants.

MS. MARGOLIS: Good morning, your Honor. On behalf of defendants E*Trade, TD Ameritrade, Scottrade, and Charles Schwab, I'm Jessica Margolis from Wilson Sonsini Goodrich & Rosati. I'm joined by, at the front table, my colleague Brian Range and, at the back table, joined by Larry Shatzer and Michael Levin. We also have our expert Dr. Michael Shamos at the back table in the center. Finally, we've got representatives from two of our clients here today, Mr. David

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1 Hale from TD Ameritrade and John Bersin from E*Trade. And,
2 your Honor, Mr. Shatzer, at the back table, will be primarily
3 addressing the Court today on behalf of defendants.

4 THE COURT: . We're here because we have this one
5 little, but critical, part of the claim construction to finish,
6 and in that regard, you have submitted affidavits from
7 Dr. Martin on behalf of Droplets and Dr. Shamos on behalf of
8 the defendants.

9 We start with my disclaimer, which you've heard
10 before. I am a Luddite. I am not a computer person. This is
11 a glorified typewriter and post office, as far as I'm
12 concerned. And I'm not shy about that, but I'm not really as
13 unsophisticated as I appear. So I need things explained very
14 clearly.

15 In that regard, I understand everything in
16 Dr. Shamos's affidavit. I do not understand a lot of things in
17 Dr. Martin's affidavit. So we start with the defendants
18 already out in front because I understand what their expert is
19 telling me, and I do not understand what the plaintiff's expert
20 is telling me. It does not appear to be addressing what I
21 asked to have addressed, but that's probably because I don't
22 understand it. I just wanted to get that out there right at
23 the beginning because I don't want anybody to be disadvantaged.
24 You need to teach me. Okay?

25 You need to teach me, so it may be necessary, as a

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1 result, for there to be a little more direct of Dr. Martin than
2 I would otherwise have anticipated. I'm kind of confused.
3 Dr. Shamos's affidavit is very straightforward. It's very
4 understandable. It answers exactly the questions that I asked.
5 Maybe Dr. Martin's does, too, but if it does, he does it in a
6 way that I'm not getting.

7 That said, Mr. Reichman, the floor is yours.

8 MR. REICHMAN: Your Honor, if it would be helpful, I
9 could make a few opening comments about where we're going.

10 THE COURT: That's fine.

11 MR. REICHMAN: It seems to me that, pursuant to your
12 Honor's direction, there are two issues to talk about today.
13 The first one is the one that you've already mentioned, going
14 through the witness examinations so we can figure out what was
15 allegedly disclaimed or what technologies that were disclaimed.

16 THE COURT: What was disclaimed? What was disclaimed
17 in 2000, what was disclaimed in 2008 because you have a
18 reexamination --

19 MR. REICHMAN: That's correct.

20 THE COURT: -- which, by the way, as far as I can
21 tell, is not addressed in Dr. Martin's affidavit. Maybe I
22 missed it. It's clearly addressed in Dr. Shamos's affidavit.

23 MR. REICHMAN: In addition, pursuant to your Honor's
24 direction, we'll talk about the law regarding the scope of the
25 disclaimer.

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1 The focus of the hearing, as I understand it, is the
2 proposed negative disclaimer or negative limitation about what
3 an interactive link cannot be. It cannot be a list of
4 different technologies.

5 THE COURT: Right.

6 MR. REICHMAN: I come at this from a point of view,
7 your Honor, as you do, not being a technical person by training
8 but coming to it as a lawyer, and I'm hopeful that today you're
9 going to see Dr. Martin's testimony. We've got some graphics
10 and it will explain it in a way that will be more interactive
11 and a little more understandable.

12 THE COURT: If they're cartoons, I love cartoons.

13 MR. REICHMAN: We've got a couple cartoons.

14 THE COURT: Good. Very important.

15 MR. REICHMAN: He's going to focus on what was the
16 state of the art in 1999, so focus on what this technology was
17 capable of at the time at the time that this patent relates
18 back to the provisional application to which the '745 patent
19 relates, as filed in 1999. What he's going to explain, if you
20 want to boil it down to its essence, is he's going to show why
21 the technologies in question in 1999 did not have the
22 facilities for restoring previous operating states, what I call
23 the facilities clause, that's part of the Court's construction.

24 In this regard, the question today, I don't think, is
25 what were these different technologies, URLs and the like,

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1 what's the definition of them; I think the question is what was
2 their functionality in 1999. In that regard, that's where I
3 see the opposing declarations of the experts in this case
4 missing each other or passing in the night in the sense that I
5 think that Mr. Shamos's declaration is more focused on
6 definitions, and you'll see the testimony today from Dr. Martin
7 is more focused on what was the functionality of these
8 technologies back in 1999.

9 You're going to hear the testimony that it didn't make
10 any sense in '99 for URLs and the like, these technologies, to
11 have facilities for restoring an operating state because you
12 didn't have client side applications running from within
13 browsers. It wouldn't have been necessary, it wouldn't have
14 been appropriate, to have the facilities, facilities clause
15 that we're talking about. URLs and the other technologies at
16 issue did not, in 1999, facilitate the storage of operating
17 states. The Web pages were static. There was no need to be
18 facilitating the storage of these operating states.

19 But today, it's very different, and you'll hear
20 testimony about that, your Honor. Today it's different. Today
21 the technologies in question, URLs and the like, are part of
22 the package that is facilitating the storage of operating
23 states. And why is that? Because today, unlike in 1999,
24 applications are running on the client side from within the
25 browser, and we're going to show you examples of what we mean

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1 by that. It's not going to be just words; it's going to be a
2 graphic so you can see what we mean when we say applications
3 are running from the browser. Because you're running these
4 applications on the client side, now, today, it is necessary to
5 facilitate the storage of the operating states. Today URLs and
6 the like can be involved. They may not do the whole job, but
7 they can involved in facilitating storage on these operating
8 states.

9 Again, this is where, I think, there is a disconnect
10 between the experts. It's not a question, I don't think, and I
11 think you'll hear Dr. Martin testify, it's not a question of
12 definitions. I don't know that the definition of URLs and the
13 like has changed since 1999. But what they do, what the
14 technologies in question do, has certainly changed since 1999
15 when the Internet itself was being invented. And I don't
16 review Professor Shamos's declaration as saying that URLs,
17 bookmarks, or the other technologies had facilities for
18 restoring previous operating states in 1999, and if that ends
19 up being the position, that's something that we dealt with at
20 the invalidity stage of the case, which really brings me to the
21 second point of my introductory comments, and that is the law
22 relating to disclaimers.

23 I'm going to assume, absent other direction from the
24 Court, that you don't want extensive argument at this point on
25 the law, that we'll deal with that when we wrap up today, but

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1 maybe I'll give you a two-minute preview of what we intend to
2 argue.

3 I think our legal point, Droplets's legal point, boils
4 down to the proposition that there isn't going to be a need,
5 under the case law, for your Honor to adopt the proposed
6 negative limitation. We think it's contrary to precedent, and
7 that's precedent that does not favor negative limitations in
8 the first place, and it's also contrary to the law regarding
9 disclaimers. For there to be a disclaimer, the thing had to be
10 claimed in the first place, and in this case, the URLs, as they
11 existed in 1999, standing alone, there was never an allegation
12 that those were in the four corners of the patent. Why not?
13 Because they never facilitated the storage of previous
14 operating states. They never had the facilities clause. So
15 there was never within the claim, it was not disclaimed. It
16 was merely distinguished.

17 The point of this is that there is no opportunity,
18 there is no risk of recapture. It seems to me, in reading the
19 Court's Markman rulings, there's a concern and a concern
20 expressed in the defendants' briefing of what I call anyway
21 recapture; that is, something that was distinguished as part of
22 the prior art is not now being claimed as infringing. I think
23 that the Court's construction and the bedrock principles of
24 patent law protect against recapture. There is no realistic
25 possibility of that happening in this case. And why? Because

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1 the Court adopted the facilities clause, for starters,
2 facilities for restoring the previous operating state. That's
3 how the prior art was distinguished. If defendants come
4 forward at the invalidity stage with prior art that it has the
5 facilities for restoring the previous operating states and
6 meets the limitations, then these patents are invalid, so it's
7 game over at that point. But we don't think that we're going
8 to see any testimony when it comes to the invalidity stage that
9 these facilities were present in the prior art. That's how it
10 was distinguished in the first place.

11 So then is there an opportunity for recapture on
12 infringement? No, because if what Droplets is accusing does
13 not have the facilities for restoring the previous operating
14 state, then there's no infringement, and, if it does, there is
15 infringement. This is all dealt with in terms of bedrock
16 principles of invalidity and infringement.

17 THE COURT: Can I tell you something? You're right.
18 You're cute, because we all know what the game is here. I've
19 done this a hundred times now. The game is to get the claims
20 defined in such a way that the issue of the infringement,
21 particularly infringement, secondarily validity, is disposed
22 of. I mean that's round one, to get the terms and the claims
23 defined so that you can say, Hah, we have that, we don't have
24 that, game over. We're out.

25 You're trying to do it, too.

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1 MR. REICHMAN: Certainly the parties craft their
2 positions with an eye towards invalidity and infringement.

3 THE COURT: Right.

4 MR. REICHMAN: But the case law is clear also though
5 that the district court does not need to be looking at the
6 claim construction with an eye towards those things.

7 THE COURT: I'm always trying to figure out what the
8 heck you guys are trying to do, how you're trying to bamboozle
9 me into deciding the case when I don't know that I'm deciding
10 the case. I'm not so unsophisticated as not to know that the
11 game at this stage is to get me to decide the case without even
12 knowing that I'm deciding the case. Okay? That's what claim
13 construction is all about. That naive I'm not.

14 MR. REICHMAN: That's part of the point that I'm
15 trying to make about invalidity and infringement, to give the
16 Court a view toward how this plays out in terms of invalidity
17 and infringement.

18 THE COURT: You just told me I should not have an eye
19 to that, that the case law forbids me from doing that, so let's
20 not talk about that. I want to define the term. I want to
21 define the term, and the law tells me that when I define the
22 term, I'm supposed to look at the prosecution history and I'm
23 not supposed to define a term in a way that recaptures -- that
24 is the correct word -- something that wasn't disclaimed in the
25 prosecution history. That's all this is about.

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1 That's all this is about. We're not going to discuss
2 explicitly how whatever definition I adopt will advance it, one
3 side or another, in the merits litigation. But I'm not a dope
4 and I know perfectly well that one side or the other will be
5 advantaged in the merits litigation, depending on how I come
6 out. Okay? So fine, but I have to define the term.

7 MR. REICHMAN: That's right.

8 THE COURT: I have to define the disputed term. I
9 don't have any choice. I do not choose to defer it because, as
10 far as I'm concerned, we've got to get the definitions on the
11 table so you know what you're litigating over.

12 MR. REICHMAN: I think that's right, your Honor, and
13 the law that we'll talk about at the end in terms of what is
14 the scope of a disclaimer, I submit, Droplets submits, that
15 this is not within the law in terms of the scope of the
16 disclaimer.

17 THE COURT: Great. That's your position. Now let's
18 get to what we want to talk about today, which is this
19 evidence.

20 MR. REICHMAN: At most, then, what you'll see in the
21 evidence, the most that could be disclaimed, just as a matter
22 of logic, is what existed in 1999: the technologies that were
23 later created could not have been disclaimed.

24 Thank you, your Honor.

25 THE COURT: Let's get started. It's your nickel.

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1 MR. BUDWIN: Your Honor, absent any guidance to the
2 contrary, we would call Dr. David Martin.

3 THE COURT: I think that would be the best possible
4 idea.

5 MR. BUDWIN: Come forward, please, Dr. Martin.

6 DAVID W. MARTIN,

7 called as a witness by the Plaintiff,

8 having been duly sworn, testified as follows:

9 THE COURT: First of all, I want to apologize to you
10 for not understanding everything you have in there, but you'll
11 explain it to me.

12 THE WITNESS: I can't see how that's your fault, your
13 Honor.

14 DIRECT EXAMINATION

15 BY MR. BUDWIN:

16 Q. Good morning, Dr. Martin. It should be no surprise that
17 you're here with plaintiff, Droplets, in this case, is that
18 correct?

19 A. That's correct. Good morning.

20 Q. Dr. Martin, why are you here, as you understand it?

21 A. I'm here to testify about the term "interactive link" and
22 the proposed disclaimer.

23 Q. Are you also prepared to give the Court a background and
24 introduction into the technology?

25 A. Yes, I am.

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Martin - direct

1 Q. In your opinion, should the defendants' proposed disclaimer
2 be read in as a technological matter?

3 A. No.

4 Q. Before getting into the details of your opinion and the
5 background of the technology, can you summarize at a high level
6 why you've come to that opinion?

7 A. Yes. At a high level, the technologies that were
8 distinguished in the prosecution history did not meet the
9 construction of interactive link, specifically, the part about
10 restoring operating states.

11 Q. When you refer to the construction of interactive link, you
12 mean the core definition that the Court has already provided
13 us?

14 A. That is correct.

15 MR. BUDWIN: Can we see slide two.

16 Q. We won't belabor this point, but can you just very quickly
17 hit your expert qualifications?

18 A. Yes. I have almost 35 years' professional experience in
19 software. I have a Ph.D. in computer science, and I've taught
20 in computer science departments.

21 MR. BUDWIN: Can we advance the slide three, please.

22 Q. What is the core construction of the interactive link term
23 that the Court has already provided us, what we see here. We
24 don't have to read it.

25 A. Yes, sir. It's shown on the slide.

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Martin - direct

1 Q. We see the first part of the definition retrieves and
2 presents applications and/or information stored at remote
3 locations across the network. Do you see that?

4 A. Yes.

5 Q. Dr. Martin, is that a characteristic of all links,
6 bookmarks, shortcuts, hyperlinks, and URLs, as those have
7 existed throughout time?

8 A. I would say so, yes, for links that concern remote
9 computers. Yes.

10 Q. Then the second part of this definition, this is what we've
11 referred to as the facilities clause, provides, "Includes
12 facilities for restoring previous operating states of the
13 application," and that's the point, the application, "as the
14 application is being re-presented at the user's computer.
15 Would you agree or disagree that the second part of this core
16 definition is a characteristic of all links, bookmarks,
17 hyperlinks, URLs, shortcuts?

18 A. I would disagree. The second part is not a characteristic
19 of all links.

20 Q. And why is that?

21 A. Simply because links, in the early days of the Web, could
22 be used to retrieve and present information that had nothing to
23 do with an application running in the Web browser, and so there
24 was no operating state to consider.

25 THE COURT: Guess what? I don't understand what you

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Martin - direct

1 just said. I know you're at a higher level, but since I don't
2 want to be confused, I need to understand what you just said.

3 MR. BUDWIN: Your Honor, I promise that we're going to
4 dive right into that in one second.

5 THE COURT: Please.

6 MR. BUDWIN: I was trying to give you an overview.

7 THE COURT: The overview is too over.

8 MR. BUDWIN: Let's advance forward. Let's take a look
9 at some of the background of the Web and then we'll come back
10 and summarize some of this.

11 Q. Dr. Martin, you prepared some slides to help explain the
12 evolution of technology on the Web and help answer the specific
13 question that the Court's directed to us?

14 A. Yes, I have.

15 MR. BUDWIN: Can we advance to slide eight, please,
16 Mr. Quigley.

17 Q. What are you showing us here, Dr. Martin?

18 A. I'm showing the cover page from a book called Ajax, the
19 definitive guide by O'Reilly press.

20 Q. Is this one of the books cited in the briefing by the
21 parties?

22 A. Yes.

23 Q. Does this book provide a high-level example of how the Web
24 has evolved from 2000 until more recently and how that change
25 in operating state is key in something that came in 2005 and

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Martin - direct

1 later.

2 A. Yes, it does.

3 Q. Are you prepared to walk us through the examples in this
4 book?

5 A. Yes, I am.

6 MR. BUDWIN: Let's go to slide nine.

7 Q. What are we seeing here, Dr. Martin?

8 A. What we're seeing here is a screen shot of the MapQuest Web
9 site as it existed in 2000. MapQuest was a Web site that
10 allowed people to, say, enter an address and it would compute a
11 map and show the map within a Web browser.

12 Q. Something people familiarly and frequently use on the Web
13 then and now?

14 A. That's correct.

15 THE COURT: You've picked one that I use.

16 BY MR. BUDWIN:

17 Q. Did the MapQuest, in 2000, have links, hyperlinks, and
18 URLs?

19 A. Yes. You can see some on the screen. The big buttons, for
20 instance, are hyperlinks.

21 Q. Could you save a bookmark or create a shortcut?

22 THE COURT: What do you mean the big buttons?

23 THE WITNESS: For instance, in the right lower
24 left-hand column of the screen shot -- yes, thank you.

25 Can you see the cursor moving?

ElfWdroH

Martin - direct

1 THE COURT: Under special interests?

2 THE WITNESS: Yes. Those would be the hyperlinks.

3 Other material on the page, pretty much every independent text
4 block on the page, is probably a hyperlink.

5 THE COURT: Thank you.

6 BY MR. BUDWIN:

7 Q. Could you save a bookmark or create a shortcut to a
8 MapQuest page in 2000?

9 A. Yes. Web browsers at that time allowed users to save
10 bookmarks.

11 Q. Does the MapQuest as it exists today work in the same way
12 as it did in 2000?

13 A. Actually, no, it doesn't.

14 Q. Is that change relevant to the issue that you've been asked
15 to address today?

16 A. I think so, yes.

17 Q. I want to take one step back and I want to look at one of
18 the claims at issue in this case --

19 MR. BUDWIN: And, Mr. Quigley, if we could see slide
20 five.

21 Q. -- what are you showing us here, Dr. Martin?

22 A. We're looking at claim one in the upper left-hand corner
23 and we see the highlighting beginning with client computer and
24 further on having computer code embedded therein.

25 Q. Do we also see claim 41?

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Martin - direct

1 A. Yes, and 41 in the lower right-hand corner, which also
2 concerns the client computer, the application presented on the
3 client computer, and how that information is delivered there.

4 Q. These are some of the claims that are being asserted in
5 this case?

6 A. Yes, sir.

7 Q. Why are you showing us these claims? Why is it relevant to
8 the discussion that we're getting ready to have about the
9 MapQuest application and how it changed from 2000 to 2005?

10 A. These claims talk about the application being presented on
11 the client computer. So I think what we need to visualize here
12 is that there is some active program that runs on the client
13 computer that's doing work for the user, as opposed to the 1999
14 state of the art in which a Web browser just showed views of
15 information that was stored strictly at a Web server.

16 THE COURT: Wait. This is from the patent, right, the
17 original? So this is like a 1999 document, is it not?

18 MR. BUDWIN: This is the asserted claims.

19 THE COURT: The asserted claim.

20 MR. BUDWIN: In the '745 patent.

21 THE COURT: The patent was allowed in, what, 2000?

22 MR. BUDWIN: I don't have the exact date.

23 THE COURT: This document dates from around 1999, does
24 it not?

25 MR. BUDWIN: The provisional filing was 1999.

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Martin - direct

1 THE COURT: Provisional filing was in 1999. Okay.

2 MR. BUDWIN: Correct.

3 THE COURT: This language was created in 1999, so I
4 don't understand why you're asking him to distinguish what was
5 available in 1999 from this language, which is 1999 language,
6 as I understand it.

7 MR. BUDWIN: Your Honor, what we're going to endeavor
8 to show you is that the Web, in 1999 and 2000, worked in a
9 paradigm where the Web browser on the user's computer, all that
10 Web browser was capable of is displaying a page.

11 THE COURT: Right.

12 MR. BUDWIN: Display, that was it. That was all it
13 did. In 2005 and later, there was a fundamental shift in
14 technology on the Web where now what you actually have
15 delivered to your client computer is an application, so the Web
16 server, instead of merely sending pages that your browser
17 blindly displays the content of, what you're going to see is a
18 shift where the Web server is now delivering to your client
19 computer an application, and that application is going to run
20 in part on your client computer and in part on the server, and
21 the reason we're showing the claim language here is this is
22 what the invention claims.

23 The invention is claiming what would be called a
24 distributed application, an application that's running in part
25 on the client computer and in part on the server computer, and

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Martin - direct

1 that's why in particular we've emphasized the language from
2 claim 41 here. Claim 41, which is one of the asserted claims,
3 talks about updating the display on the client using what's
4 called net change information. So instead of merely refreshing
5 the page, there's a small, think about MapQuest and this is
6 what we're going to walk through. You move the map one iota
7 over, what would happen in 2000, the whole page would be
8 redrawn and delivered from the server.

9 What happens today is only that small part of the page
10 is updated because you have this dynamic interactive real time
11 update, and the reason that's important is because when you
12 have a distributed application, like this patent claims and
13 like what became common on the Web after 2005, now you have to
14 preserve operating state information on both the client and the
15 server. You've always preserved operating state on the server.

16 THE COURT: Okay.

17 MR. BUDWIN: We'll get to that.

18 THE COURT: All right.

19 MR. BUDWIN: We're going to walk through this.

20 THE COURT: Okay.

21 MR. BUDWIN: Mr. Quigley, could we go back to slide
22 nine. What we're seeing here is just the MapQuest as it looked
23 in 2000; it's got links, hyperlinks, you could create bookmarks
24 and shortcuts.

25 Q. Dr. Martin, this page that we're seeing here in 2000, how

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Martin - direct

1 did this work? Did this work like the invention that's being
2 claimed in the patent, or did it work differently?

3 A. This worked differently, as I explained. This is a simple
4 view of a document that's generated at the server and sent back
5 to the Web browser.

6 Q. Do we have to take your word for it, or does this book
7 actually make the exact point that we're going to endeavor to
8 make here?

9 A. The text of the book describes the details of the old site
10 and the new technologies as well and how we improved it.

11 MR. BUDWIN: Could we have the next slide, please,
12 Mr. Quigley.

13 Q. There's a lot of text here. There's a lot of highlighting.
14 I'm going to read just a little bit of it, and then maybe you
15 can help us describe a little bit. It says here that, in 2000,
16 MapQuest worked the same as all other Internet sites at the
17 time. You click on a link or a search button and you're taken
18 to a new page that had to be completely redrawn. Is that
19 consistent with the description I just provided to the Court
20 about the application not running on the client?

21 A. Yes, it is. And that is how the site worked at the time.

22 Q. And it says here you change the zoom factor, you move that
23 any direction, you get this round trip to the server that upon
24 return caused the whole page to refresh. That's what we're
25 describing?

ElfWdroH

Martin - direct

1 A. That's correct.

2 Q. Then if we look a little bit further down the page, I
3 believe it's on this page --

4 MR. BUDWIN: Mr. Quigley, you may have to check; it
5 may break to the next page, the next slide.

6 Q. -- it says what you really need to know about MapQuest and
7 all Web sites in general at the time, this is 2000, is that for
8 every user request for data, the client would need to make a
9 round trip to the server to get information, a completely new
10 page had to be loaded into the browser. This was extremely
11 frustrating, but this is how everything was done on the
12 Internet back then. As the text says, it was the only way to
13 do things.

14 MR. BUDWIN: Could we see the next slide, please,
15 Mr. Quigley.

16 Q. Dr. Martin, can you explain what this is showing us, this
17 graphic is showing us, from the textbook?

18 A. Yes. This illustration is attempting to show the click,
19 wait, and refresh style of the old Web. And what we see on the
20 left column, we see the Web browser, the client computer, over
21 time, and it's trying to show that in the first upper left-hand
22 corner view, a Web page is visible when a user does anything
23 like move the map slightly to one direction, that requires a
24 request being sent to the server. That's the top arrow going
25 to the right.

ElfWdroH

Martin - direct

1 Q. Can you speak slowly, too?

2 A. Sorry. Thank you.

3 So the request is sent to the server that's labeled page
4 request one and sent to the right. The server then computes
5 the page, the new map, and sends it in response to the client.
6 And then if the client clicks again, then the same process has
7 to happen, and it's shown here three different times.

8 Q. What is it that the user is clicking on or interacting
9 with, links, hyperlinks, URLs, things of that nature?

10 A. Yes. The user can click on a hyperlink or click on an
11 arrow to move the map slightly, for instance.

12 THE COURT: That's a link.

13 THE WITNESS: That is a link, yes.

14 BY MR. BUDWIN:

15 Q. As this is describing, when a user is clicking an arrow or
16 link to move the map a little bit, we have this process where
17 the whole page is being redrawn?

18 A. That's correct.

19 Q. In this example, would you characterize the browser as
20 running a portion of the MapQuest application?

21 A. No, I wouldn't. I would say that the browser is a viewing
22 portal for maps that are generated on the server in the right
23 column, and it actually shows that there is no client
24 application with operating state running on the Web browser
25 computer.

ElfWdroH

Martin - direct

1 Q. Now, you've told us before, that MapQuest doesn't work like
2 this today?

3 A. Correct.

4 MR. BUDWIN: And we can advance to the next slide.

5 Q. What is this telling us? When did the evolution and the
6 way that these sites worked from being what I would call server
7 centric to being distributed across a client and server? When
8 did that generally take place, as you understand it?

9 A. That took place in the mid-2000s, and I agree with the text
10 here, that Google Maps, which was a competitor to MapQuest, was
11 the first big deployment of this technology.

12 MR. BUDWIN: Can we advance to the next slide,
13 Mr. Quigley.

14 Q. What is this showing us, Dr. Martin?

15 A. Well, this is a modern version of the MapQuest Web page
16 using the new technology, and if you look at it now, it really
17 doesn't look any different than the old, but it behaves
18 differently underneath.

19 Q. How does it behave differently? Do you have some slides
20 that explain that?

21 A. I do.

22 MR. BUDWIN: Can we advance again.

23 Q. What are you showing us here, Dr. Martin? What is the
24 textbook, and what can you tell us about how a MapQuest has
25 changed between 2000 and 2005?

ElfWdroH

Martin - direct

1 A. What's attempting to be illustrated here is that the user
2 is still clicking in order to change the map, say, to scroll it
3 to the right or to the left. But rather than having the map
4 newly regenerated each time, what we see are these embedded
5 arrows. They're labeled XHR request 1, 2, and so on. Those
6 are smaller requests that are sent by the client application
7 running on the Web browser computer. Those are smaller
8 requests that just say, Hey, I need another block of
9 information in this map. You don't have to redraw the whole
10 thing, just give me the new material. And so one of those XHR
11 requests is sent to the right, the server computes just the new
12 material, and sends only the new material back to the client
13 application. That's the MapQuest.

14 THE COURT: But that happens on the server, not on the
15 client. The client computer is still essentially a display
16 mechanism; it just now has the ability to ask not for a whole
17 redraw of the page but, Could you please redraw the upper
18 left-hand corner of the page?

19 THE WITNESS: Generally, yes. In this scenario,
20 that's what the client application is doing. It's just asking
21 for a small update to the information on the page.

22 THE COURT: But how is that fundamentally different?
23 It's still asking the server at the remote location to do that,
24 to do the redrawing. It just says redraw less. How is that
25 fundamentally different?

ElfWdroH

Martin - direct

1 THE WITNESS: I think the difference is that you
2 actually have part of the application running on the client
3 now, and the term that we're discussing has to do with whether
4 it's possible to restore operating states of an application.
5 Now we have an application that's actually running on the
6 client, and it makes sense to talk about its operating state.

7 Now, this example, I agree, is just improving the
8 efficiency of the previous map.

9 THE COURT: That's what it sounds like all it's doing.
10 It's going to take less time for the server at the remote
11 location to get back to the screen what you want to see because
12 you're only asking it to redraw a little bit of the map, not
13 the entire thing. Maybe I'm not understanding what it is
14 that's happening at the client computer.

15 MR. BUDWIN: Your Honor, we have another example that
16 we can show of a live Web page that may help illustrate this,
17 but the key, the key point, is now, instead of the browser
18 merely displaying a document that's generated by the server, on
19 the client computer, part of the application is actually
20 running. It's not just displaying a page that's drawn by the
21 server. The client computer actually has logic and is doing
22 processing.

23 THE COURT: You can't tell that from this example.

24 MR. BUDWIN: So let's talk about one of the examples
25 that Dr. Shamos used in his declaration, which is the Yahoo!

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Martin - direct

1 stock chart example. Why don't we jump forward to that and
2 let's walk through that. Mr. Quigley, can we jump forward to
3 slide 25.

4 Q. Dr. Martin, what are you showing us here on slide 25? And
5 before we get into this, what is operating? We're talking
6 about operating state, saying it's important now the
7 application's distributed. What is the operating state, and
8 maybe use your MapQuest example to explain that?

9 A. Sure. Look, an application can do many different things,
10 and the operating state is what determines what the application
11 is doing at one instant rather than the full spectrum of things
12 that it can do. So for the MapQuest example, an operating
13 state might be the particular neighborhood that it's generating
14 a map of. This is something you might want to write down so
15 that later you can return to the same map segment.

16 Q. And in the old way of doing the map where the map is being
17 entirely drawn by the server, do you need to preserve operating
18 state with links and URLs and shortcuts that are on the client?

19 A. You might want to be able to regenerate those graphs later
20 from the server, but in the absence of a client application
21 running, it doesn't make sense to talk about storing the
22 client's application state.

23 Q. Let's step forward to Dr. Shamos's Yahoo! example. What
24 are you showing us here on this slide?

25 A. This is going to be, I think, a three-, or four-slide

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Martin - direct

1 sequence. It's a little technical here, but basically, I want,
2 I'm trying to illustrate the old way that things worked, the
3 flow from the client to the server, and what the server does as
4 a result, and it also defines a couple of terms that have come
5 up so far; namely, the query string and the URL.

6 Q. We see at the top of the page something labeled URL.

7 A. Yes.

8 Q. That's a uniform research locator. It's a link, could be a
9 shortcut. It's an address of something on the Internet?

10 A. Yes, and this could be the result of someone clicking on
11 something leads to this URL being used to generate a display.
12 So what happens then when the client's Web browser wants to
13 display this URL is the entire URL is analyzed and broken up
14 into pieces. The part I've colored red that follows the
15 question mark and labeled query string is simply part of the
16 URL that communicates information to the Web server, and in
17 this example, the query string is saying please generate a
18 graph of the NASDAQ index over time.

19 Q. That's what the IXIC is, that's the ticker for NASDAQ?

20 A. That's right. That refers to NASDAQ. And then there's
21 also a time frame specified here, T equals 3M, that's within
22 the query string and that says I want a range of a three-month
23 graph.

24 Q. This is an example of Yahoo! as it worked in '97, as
25 Dr. Shamos says in his declaration, '99, and they even still

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Martin - direct

1 have pages that work like this today?

2 A. That's correct. In fact, this is a URL that still works
3 today using the old technology. Yahoo! just happens to provide
4 the old technology Web site even today.

5 Q. So when a user enters this URL or clicks a link that has
6 this address, what happens?

7 MR. BUDWIN: Could we advance to the next slide.

8 A. So the URL, most of the URL is sent to the Yahoo! Web
9 server on the right here, and I'm showing on this slide simply
10 that the Web server has received the URL and it needs to create
11 a graph of NASDAQ over time, so it creates that graph and sends
12 it back to the Web browser --

13 MR. BUDWIN: Next slide, please.

14 A. -- as a completed Web page with the graph and with all the
15 other buttons and hyperlinks that belong on the Web page.

16 Q. You actually made a video that illustrates how this process
17 works?

18 A. Yes, I have.

19 Q. Can you show that to us and walk us through it?

20 A. Let's give it a try.

21 Q. We may have to pause the view a couple times to make sure
22 we keep up.

23 A. Here we go. I'm launching the Web browser now, and I
24 have --

25 MR. BUDWIN: Can you pause it.

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Martin - direct

1 Q. What do we see?

2 A. What we see is the Web browser simply having been launched,
3 and I'm about to click on a bookmark. It's hard to read, but
4 this is just a bookmark that goes to the Web site I was just
5 discussing, the finance Yahoo! Web site.

6 Q. So you've created a bookmark that has the URL that you
7 showed in the prior example, the three-month NASDAQ graph?

8 A. That's correct.

9 Q. You're going to click on that URL and now we're going to
10 see what happens?

11 A. Right.

12 MR. BUDWIN: Please advance the video.

13 A. So the graph is constructed by the Web server and then
14 delivered to the Web browser.

15 Q. Correct.

16 A. Yes.

17 Q. In its entirety?

18 A. In its entirety.

19 MR. BUDWIN: If we advance the video further --

20 A. I guess we rewind the video a bit so there's a little bit
21 of a repeat here. So now I'm just moving the mouse pointer,
22 showing the contour of the line. It kind of doesn't do
23 anything. It's not a very live chart, but here I'm clicking on
24 a different range. I'm saying --

25 MR. BUDWIN: Please pause that, Mr. Quigley.

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Martin - direct

1 A. I just clicked on, I know it's hard to read here, but --

2 THE COURT: Six months.

3 THE WITNESS: Six months, right.

4 A. And let's do another one. You may have seen when I clicked
5 on six months, the entire screen was erased and then redrawn
6 with the new graph. I'll do this again here if we just go --

7 MR. BUDWIN: Slide back a little bit and then play it
8 again.

9 Q. Go ahead. See that white flash? Is that indicative of a
10 page being redrawn, that white flash, Dr. Martin?

11 A. That is what I was discussing. Yes.

12 THE COURT: So long, that must have taken at least
13 like a tenth of a second.

14 Q. So what we're seeing here is using the older technology,
15 the browser's just displaying the chart on the page as that
16 whole page and that whole chart is being generated by the
17 server?

18 A. That's correct.

19 MR. BUDWIN: Let's advance the video further.

20 A. The next thing that I did was try to show how the Web
21 browser is just a portal on to the Web server, showing what the
22 Web server creates, and it has no independent application
23 ability itself.

24 MR. BUDWIN: Pause it.

25 Q. Why is it important whether the application as it's running

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Martin - direct

1 on the client, or why is it important if there is an
2 application running on the client or not?

3 A. Again, we're talking about the ability to restore operating
4 states of an application that runs on a client.

5 Q. In this example, is there an application running on the
6 client?

7 A. No. This is the old technology.

8 Q. You're going to show even further illustration of why
9 that's the case.

10 MR. BUDWIN: Go ahead. Push forward.

11 A. That's correct. So what I've done now is I have unplugged
12 the network connection and now I'm going to click on one of
13 these hyperlinks.

14 THE COURT: What do you mean you've unplugged the
15 network connection?

16 THE WITNESS: I mean it's actually taking the network
17 link and turning it off so the computer that I'm making a video
18 of here is not able to talk to any other computers now,
19 including the Web server.

20 BY MR. BUDWIN:

21 Q. You've broken the connection between the client and the
22 server?

23 A. That's correct.

24 MR. BUDWIN: This is going to be a test, your Honor,
25 so we can see whether or not there is an application running on

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Martin - direct

1 the client side or not.

2 Advance it and let's see what happens. I need a new
3 graphics guy.

4 THE COURT: Basically, what you're going to do is
5 you're going to click like 12 months, or something, and
6 nothing's going to happen because you're not connected to the
7 Internet.

8 MR. BUDWIN: Correct. And you don't have any portion
9 of the application that's running on the client, so there's no
10 need to preserve session state because there is no application
11 running on the client.

12 Q. Now, do you have another example, just like MapQuest, as to
13 how this same technology works using this distributed
14 application claim type claimed by the claims where you have
15 this need to preserve session state, operating state?

16 A. Yes, I do.

17 MR. BUDWIN: Now, can we advance to the next slide.

18 Q. Dr. Martin, what are we seeing here?

19 A. This is the three-, or four-slide explanation of the video
20 that we'll see afterwards, and it shows the new technology.

21 Q. Let me stop you. I see at the top a URL similar to the one
22 that we saw before.

23 A. Yes, it's not exactly the same, but it's similar.

24 Q. It's a URL?

25 A. Yes.

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Martin - direct

1 THE COURT: It's definitely a URL.

2 BY MR. BUDWIN:

3 Q. And you could have a link or a shortcut or a bookmark to
4 this URL?

5 A. Yes, you could.

6 Q. And then looking here, I see you've labeled a box query
7 string.

8 A. Yes.

9 Q. And within that query string, I see the EIXIC, that's the
10 same NASDAQ index?

11 A. Yes, it is.

12 Q. Except now I see plus interactive?

13 A. Yes.

14 Q. And so is this going to be a different example than what we
15 saw before?

16 A. Yes, it is.

17 Q. And at the very far end of this, you labeled something as a
18 fragment identifier. What is the portion of the fragment
19 identifier?

20 A. The fragment identifier starts with the green sharp symbol
21 and it includes all the text including symbol equals and range
22 equals.

23 THE COURT: What does that mean?

24 THE WITNESS: The fragment identifier is going to be
25 used by the application that now actually is running on the

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Martin - direct

1 client to figure out how much of the NASDAQ graph to actually
2 display to the user.

3 BY MR. BUDWIN:

4 Q. I see you have this computer on the left and the Yahoo!
5 server on the right, and I see there's a get in the middle.
6 What does that illustrate?

7 A. This is showing the client again sending a request to the
8 Web server, but it's requesting an application now, not merely
9 a Web page. It's requesting an application.

10 Q. And then I see you show below the client computer, you say
11 this portion of fragment identifier, see that, is not sent?
12 Why is that important?

13 A. It's important because what is going to be delivered back
14 to the client is an application that is going to look at this
15 green fragment identifier, and the application will decide what
16 range is appropriate to display to the user based on the user's
17 initial request. In fact, the Web server in this scenario
18 never even knows what date range is being shown to the user.

19 Q. Is it possible or would it be fair to characterize at least
20 some query strings of the type that you've shown here as being
21 operating state information for the application as it exists on
22 the server?

23 A. Yes.

24 Q. But, is it important in this example in contrast to the
25 prior example and in a context of the distributed application

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Martin - direct

1 claimed in the patents at issue here that a portion of the
2 fragment identifier that's maintained on the client, why is
3 that important?

4 A. It's important because the fragment identifier is a good
5 place to store operating state information about the client
6 application simply because it is always maintained on the
7 client. It's never even sent to the server.

8 MR. BUDWIN: Can we advance to the next slide.

9 Q. That's what you're endeavoring to show here: now, in this
10 example, the application, as it runs in the client, it's
11 remembering part of the information in that URL or that
12 shortcut?

13 A. That's correct.

14 Q. And that's operating state information for part of the
15 application running on the client?

16 A. That's right.

17 Q. But if we look at what's happening on the server, what is
18 the server doing now, Dr. Martin?

19 A. The server now constructs this interactive application that
20 it's going to deliver.

21 Q. Let me stop you there.

22 MR. BUDWIN: Why don't we go ahead and advance to the
23 next slide.

24 Q. You're saying it's constructing an application. How is
25 constructing an application different from what we saw in the

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Martin - direct

1 prior example where the server's constructing a page with a
2 static GIF or JPEG image that shows the stock quote?

3 A. The difference is in the prior version, the Web page that's
4 generated really just has images and text and layout
5 information in it.

6 Q. I see, if I look at the page that you're showing being sent
7 back here, there's actually no stock ticker or graph being
8 displayed. That's different from the prior example.

9 A. That's correct. In the modern example, the graph isn't
10 generated at the server. Rather, the server sends a program, a
11 client application, that is capable of constructing the graph
12 on the client computer.

13 Q. Is that what you're showing here on the next slide?

14 A. That's correct.

15 Q. What is happening now once this application, once that's
16 received by the client, what's the client doing with that
17 application?

18 A. When received by the client, the client runs this
19 application and looks at this green fragment identifier, sees
20 the one-day date range, and it knows that it needs to construct
21 the graph. And so it constructs this graph and it puts it on
22 the Web browser making it visible, and then it continues
23 running, watching what the user is doing, to see if the user
24 wants to change anything on the graph.

25 Q. So now, do we actually have logic running on the client in

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Martin - direct

1 addition to logic running on the server that's going to
2 process, interpret, and update the display for the user without
3 having to make any queries to the server at all?

4 A. That's correct.

5 Q. Is that important?

6 A. Yes, that is important.

7 Q. Why?

8 A. Because, again, this means that much of the computing
9 burden of generating these graphs is now borne by the
10 individual users. Okay? This is, makes it much easier to run
11 the Yahoo! servers because they don't have to construct the
12 graphs; they just have to send graphing applications to users.
13 So that's a benefit to Yahoo!.

14 Q. Why is that important in the context of the specific
15 question that you're being asked to address today, which is
16 whether or not the capabilities and functionalities -- links
17 and URLs and hyperlinks and shortcuts -- have evolved from 1999
18 until today?

19 A. Again, back to the client application running, since the
20 application is running here, it makes sense to want to record
21 its operating state; namely, what is being graphed and what the
22 range of that graph should be. Okay? And so that operating
23 state is visible in the URL as part of the fragment identifier
24 and can be bookmarked.

25 Q. Do you have another video that shows this example or kind

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Martin - direct

1 of contrasts it somewhat to the prior one?

2 A. Yes, I do.

3 Q. Again, let's just walk through this slowly. What are we
4 seeing, Dr. Martin?

5 A. This will look initially very similar to the previous
6 example, but this uses the modern technology. So I clicked on
7 the new link, and we will see a brief pause and a graph
8 appears. It's been constructed by the client application, and
9 now if we continue, I'm going to move my mouse pointer around
10 on the graph. You can see there's a small dot that follows the
11 mouse pointer and there's a number that tracks the dot in the
12 upper left. It's a little small. So that's showing the client
13 application doing something. And now I'm going to, as before,
14 disconnect from the network. It's no longer able to talk --

15 Q. Sorry. Why are you disconnecting from the Internet, and
16 what is that going to prove?

17 THE COURT: Because you asked him to.

18 I know what it's going to prove. It's going to prove
19 that there's going to be a change that is going to be made on
20 this graph, even though he's no longer connected to the
21 network, that something's happening on the client computer.

22 MR. BUDWIN: Right. Part of the application is
23 running on the client.

24 THE COURT: That I got.

25 MR. BUDWIN: Advance.

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Martin - direct

1 THE COURT: So disconnect, press the button, and
2 update the graph.

3 THE WITNESS: Exactly. That's exactly what we'll see
4 here. We're disconnected, as shown in the lower right-hand
5 corner. You can still click and change the date range. Again,
6 just shows that a client application is now running. So that's
7 the essential difference between the old and the new.

8 BY MR. BUDWIN:

9 Q. And now because this client application is running on the
10 client in part, what does that mean about operating state?

11 A. That means that it's relevant to store the operating state
12 of the client application because we have a client application.

13 Q. Now, we can all agree or disagree about how evolutionary
14 this change in the Web was. I mean, I think if you look at the
15 relevant commentators --

16 MR. BUDWIN: And, Mr. Quigley, can hold up the Ajax
17 book in front of him.

18 Q. -- it's all about this. This is a thick book. This is a
19 big change that fundamentally happens in the mid-2000s, and
20 that change is fundamental to the conventions that are claimed
21 here.

22 MR. BUDWIN: If we can go to slide 14, back to the
23 claim language, this is where -- sorry. Slide 15. Back to the
24 claim language. This is where we have to look to see what the
25 invention is that's being claimed.

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Martin - direct

1 Q. Dr. Martin, in light of the example that you gave us of
2 MapQuest and Yahoo! and looking at the language, the first part
3 of the language of claim one, can you explain how those
4 examples are relevant to the claim language and whether the old
5 systems -- did old systems read on claim one?

6 A. No, they don't, because the old systems don't have computer
7 program code embedded that arise at the client. That's
8 referring to the client side of the application.

9 Q. If we look at claim 41, this is the claim that talks about
10 using the net change information. Did the old Yahoo! and
11 MapQuest read on claim 41?

12 A. No, for the same reasons.

13 Q. Again, would a modern Web application where part of the
14 processing is borne, part of the application is on the client,
15 is that germane? Does that fall within the type of
16 architecture invention set forth in claim one and claim 41?

17 A. Yes. It's relevant and it potentially would satisfy these
18 highlighted limitations.

19 Q. So that's why this change is relevant in the state of the
20 art because now we have these client server applications as
21 opposed server-centric applications?

22 A. That's correct.

23 Q. Dr. Martin, with that background, I'd like to advance and
24 ask you some questions about the specific prior art that was in
25 prosecution because the patentees are distinguishing specific

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Martin - direct

1 pieces of art, and it's what the patentees had to say about the
2 capabilities of those specific pieces of prior art. That's
3 what's relevant to the scope of the alleged disclaimer and
4 whether or not there's recapture. That's my statement; you
5 don't have to agree with that.

6 MR. BUDWIN: Let's take a look at slide 16.

7 Q. This is the Gish patent. This is one of the pieces of
8 prior art that was being discussed in prosecution?

9 A. That's correct.

10 Q. And we can see a date at the top, June 16, 1998, filing
11 date of '96. Before we get into the meat of the issue, there's
12 another reference called ICE-T that's been talked about?

13 MR. BUDWIN: Next slide.

14 Q. High-level overview, ICE-T user guide '96. Is there a
15 relationship between the Gish patent in slide 16 and the ICE-T
16 system that we see in slide 17?

17 A. Yes. They both describe the same invention. Gish is the
18 patent and ICE-T is simply a user's guide.

19 Q. Let's advance a little bit. We're going to talk about Gish
20 and ICE-T together, if that's okay with you, Dr. Martin, since
21 they're similar or the same.

22 A. Yes.

23 MR. BUDWIN: Slide 18, please, Mr. Quigley.

24 Q. What is, at the highest level, the Gish patent and the Gish
25 system? What is it about?

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Martin - direct

1 A. The Gish invention provides a way to create client server
2 applications that run over the Internet.

3 Q. So at a high level, how is the system described in Gish and
4 ICE-T different from the inventions claimed in the '745 patent
5 and in particular some of the claims, one and 41, that we've
6 shown the Court?

7 A. One relevant difference is that Gish does not describe any
8 mechanism for restoring previous operating states of an
9 application.

10 Q. That's the second part of the Court's core definition of
11 the interactive link term?

12 A. That's right.

13 Q. Do Gish and ICE-T discuss links as that technology existed
14 in 1998?

15 A. Yes, they do. We can see a reference to a link on the
16 slide 18.

17 Q. No surprise that links were in the prior art in 1998?

18 A. No.

19 Q. Not disputing that the Gish patent and ICE-T reference
20 discuss links as they existed?

21 A. No.

22 MR. BUDWIN: If we could see slide three, Mr. Quigley.

23 Q. This is back to the Court's core definition, rooted in the
24 claims and the parts of the construction that we've already
25 received. Did the links discuss in Gish and ICE-T meet the

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Martin - direct

1 first part of the Court's core definition of interactive link?

2 A. Yes, they would.

3 Q. Why is that?

4 A. Because the hyperlinks discussed in Gish are able to
5 retrieve and present information stored at remote locations
6 across the network when selected.

7 Q. Now, would the links in Gish and ICE-T meet the facilities
8 clause, the second part of the Court's core construction of the
9 interactive link term?

10 A. No, it wouldn't. Because, as I said, there is no
11 application operating state to restore described in Gish.

12 Q. And so the fact that Gish and ICE-T failed to meet the
13 second part of the Court's construction of interactive link
14 shows that no additional disclaimer, at least as to those
15 references, is warranted. That's my statement; you don't have
16 to accept that. It's a legal statement.

17 MR. BUDWIN: Let's advance to the Dickman reference,
18 which is another of the pieces of prior art that's being
19 discussed, and this is slide 19.

20 Q. What's the date on the Dickman patent?

21 A. March 2, 1999.

22 Q. Can you tell us a bit about the system being claimed by
23 Dickman?

24 A. Yes. The invention of Dickman was to describe simply a new
25 place to store a bookmark. Previously, bookmarks were stored

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Martin - direct

1 strictly within the Web browser and Dickman says, Hey, you can
2 actually take the bookmark and store it outside of the Web
3 browser as well.

4 Q. If we look at the abstract here, there's a reference to URL
5 and there's a reference to an Internet shortcut?

6 A. Yes.

7 Q. So, again, no surprise that those technologies existed or
8 were discussed in the prior art?

9 A. Right.

10 Q. So at a high level, how is it that the invention in Dickman
11 is different from what's being claimed by the patents at issue
12 in this case?

13 A. Again, the difference is that Dickman does not describe
14 applications running on the client. It simply describes links
15 and where the links are going to be stored. So without
16 describing applications, there's no need to be concerned with
17 storing the application operating state.

18 Q. If we go back to the Court's core definition of the
19 interactive link term in slide three, would the URLs and the
20 shortcuts that are discussed in Dickman meet the first part of
21 the Court's core definition?

22 A. Yes, they would.

23 Q. Why is that?

24 A. Because, as hyperlinks, they're able to retrieve and
25 present information stored at remote locations.

ElfWdroH

Martin - direct

1 Q. Would the URLs and the shortcuts that are being talked
2 about in the Dickman reference meet the second part of the
3 Court's core construction of the interactive link term?

4 A. No, they wouldn't, because there is no description of
5 applications, and at that time there were no client side
6 applications that could be invoked using links.

7 MR. BUDWIN: Again, I would just make a statement --

8 THE COURT: You don't have to make a statement.

9 MR. BUDWIN: Let's talk about the next slide.

10 THE COURT: Let's not. Do me a favor. I have a
11 criminal matter that is going to take about eight minutes, but
12 I have a whole bunch of people sitting in the back and I'd like
13 to get them out of here, as the billable hours are starting to
14 run. Why don't we take a ten-minute break and let me deal with
15 this criminal matter.

16 (Recess)

17 (In open court)

18 THE COURT: You're still under oath.

19 MR. BUDWIN: We need to go back. I realized I started
20 addressing one of the Court's earlier questions and didn't
21 preface that I was actually doing that. So let's take a step
22 back to slide 16, please.

23 Before the break, we talked about the Gish and ICE-T
24 references. Those were references that were being asserted in
25 the re-exam, and so the basis on which those references were

ElfWdroH

Martin - direct

1 distinguished, and we'll look at the alleged disclaimers about
2 these references in a minute, but I just wanted to point that
3 out, that those were reexamination references.

4 THE COURT: They were, correct.

5 MR. BUDWIN: The same is true with respect to the
6 Dickman reference, slide 19, which is where we were at the time
7 we took the break.

8 THE COURT: Yes, because I think I sent out an e-mail
9 that said, Guys, where is stuff in the record from the original
10 prosecution, and I was told that everything was from
11 reexamination.

12 MR. BUDWIN: Correct, yes. It was a filing of that
13 nature.

14 Let's pick back up where we were. This is the Dickman
15 reference, slide 19. It's a re-exam reference, filed in '95.
16 The date of patent is '99, and talks about URLs and Internet
17 shortcuts. Could we go to slide three.

18 Q. Would the URLs and the shortcuts in Dickman meet the first
19 part of the Court's core construction of the interactive link
20 term?

21 A. Yes, they would, because they can be used to retrieve and
22 present information stored at remote locations.

23 Q. Would the URLs and the shortcuts in Dickman meet the second
24 part of the Court's core construction of interactive link?

25 A. No, they wouldn't, because they don't describe the

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Martin - direct

operating state of an application or even an application.

MR. BUDWIN: Let's take a look at slide 21. This is a part of Dickman that we'll actually see being discussed in the sites that the defendants point to for the alleged disclaimer, and the very last sentence -- I'll read it, this is describing, this is quoting, this is actually out of the Dickman patent -- says, "The Internet shortcuts encapsulate URLs or other location information and other information. The Internet shortcuts are implemented as objects that are visible within shell name space."

Q. Is that consistent with how you described the Dickman reference, Mr. Martin?

A. Yes, it is.

Q. Let's take a look at one more reference that is being discussed in the prosecution which is LeMole, slide 22. What do we see as the date of the LeMole patent?

A. December 28, 1999.

Q. And, again, if we look a little bit below in the abstract, there is a reference here to specific URL addresses?

A. Yes.

Q. What is the LeMole patent claiming or describing, at a high level?

A. LeMole describes a facility for delivering appropriate advertisements to Web browser users.

Q. And if we look at the next slide, this is the summary of

ElfWdroH

Martin - direct

1 the LeMole invention, straight out of the LeMole patent?

2 THE COURT: Do me a favor. Say that again, what
3 LeMole was.

4 THE WITNESS: Sure. LeMole describes a technique for
5 selecting advertisements to display to the user of a Web
6 browser.

7 BY MR. BUDWIN:

8 Q. In fact, is that what we see being described here with the
9 summary of the invention, "In accordance with the present
10 invention, a customized advertising repository server is
11 connected on the World Wide Web"?

12 A. That's correct.

13 Q. Then if we look a little further, it says, "and it can be
14 accessed by a registered user through his or her browser,
15 either by clicking on an icon or inputting a specific URL
16 address of the particular server which stores the user's
17 advertising repository."

18 A. Correct.

19 Q. So, if we look back to the Court's core construction of the
20 interactive link term in slide three -- actually, before we get
21 there, at a high level, how does the advertising system in
22 LeMole differ from the inventions claimed in the patent?

23 A. LeMole delivers advertisements, generally images, to a Web
24 browser user, and it does not discuss applications that do work
25 on behalf of the user at all.

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Martin - direct

1 Q. So, again, if we look at the Court's core definition in
2 slide three, the interactive link term, would the URL that's
3 being described in LeMole meet the first part of the Court's
4 construction?

5 A. Yes, it would.

6 Q. Why is that? Why is that?

7 A. Because such URLs were used to retrieve and present
8 information; namely, advertisements.

9 Q. Would the URLs being discussed in LeMole meet the second
10 part of the Court's core construction of the interactive link
11 term?

12 A. No, because the advertising delivered can't be considered
13 applications.

14 Q. So in light of that background, now that we've talked a
15 little bit about the technology and the reference, I think it
16 would be helpful to look at the specific disclaimers that the
17 defendants are pointing to, and I also think it's important to
18 keep the disclaimer in mind not only in the context of the
19 technology as it existed in 1999 in general, but I think it's
20 fundamentally important to keep in mind the specific technology
21 and discussion that are in the references that are actually
22 being distinguished.

23 MR. BUDWIN: Let's take a look at slide 39, please.

24 Q. What we see on slide 39 is one of the disclaimers
25 defendants have pointed to. Have you reviewed these,

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Martin - direct

1 Dr. Martin?

2 A. Yes, I have.

3 Q. Here, there is the discussion of Dickman, which is one of
4 the references we talked about earlier?

5 A. Yes.

6 Q. And it says, "Internet shortcuts encapsulate URLs or other
7 location information and cannot perform the functions of
8 interactive links as claimed." Do you see that?

9 A. Yes.

10 Q. In light of what the Court has already given us, two-part
11 interactive link construction, what do you understand this
12 disclaimer to be talking about?

13 A. This disclaimer is talking about the way in which URLs were
14 used at the time.

15 Q. And specifically in the Dickman reference?

16 A. Specifically in the Dickman reference, and regarding URLs
17 as communicating location information.

18 Q. And you see, looking at the portions that we've highlighted
19 here, "The Internet shortcut is used by the operating system to
20 launch a buffer application and to retrieve resources that
21 reside in the Internet." URLs and other location information
22 are merely location data, correct?

23 A. Correct.

24 Q. URLs and other information are elements that inform the
25 browser to locate certain items, right? That's what the

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Martin - direct

1 applicants are saying?

2 A. That's correct.

3 Q. And if we go back to the Court's core construction in slide
4 three, we see that what the applicants are saying is the URLs
5 that are in Dickman, they talk about location and how to
6 retrieve information over a network, right?

7 A. They do.

8 Q. That's the first part of the Court's definition?

9 A. Yes.

10 Q. I don't see any reference in this disclaimer to the second
11 part of the Court's core definition, which is about operating
12 state of applications, so if we go back to slide 39, do you see
13 any such reference or discussion in the disclaimer?

14 A. No, I don't.

15 Q. Is it fair to say the discussion that's being provided here
16 is consistent with the Dickman reference and the way that you
17 described it to the Court?

18 A. Yes, I would say that.

19 Q. Now, the defendants like to focus on the section heading,
20 "Internet shortcuts do not represent an interactive link."
21 That's what they point to. But do you think it's important to
22 actually look into the substance of the argument the applicant
23 is making in addition to merely looking at section headings?

24 A. Yes, I do. It's important to understand the full
25 explanation.

ElfWdroH

Martin - direct

1 Q. And this is talking about a specific reference, the Dickman
2 reference?

3 A. That's my understanding.

4 Q. Now, in addition to what you've told us about the Dickman
5 reference not including operating statement information, have
6 you seen any indication from the defendants or from Dr. Shamos
7 in his declaration that the Dickman reference included
8 operating state information so that the defendants or the
9 applicants would have to broaden their disclaimer to get around
10 it? Have you seen that allegation?

11 A. No, I haven't.

12 Q. Let's take a look at the second disclaimer the defendants
13 point to, and this is the same basic text of what we saw in the
14 last one. It's the same heading and it's the same subject
15 matter. Again, the applicants are pointing out that the
16 Internet shortcuts in the Dickman reference being discussed
17 here are location based?

18 THE COURT: You know, I just have to say one thing.
19 I'm so happy today, this is so much more fun than what I did
20 the last two days. You guys are such great lawyers, but you're
21 doing legal argument. I don't need him to be on the stand
22 while you're doing legal argument. I need him to give
23 testimony about that which he is an expert. Okay?

24 MR. BUDWIN: That's a fair point.

25 THE COURT: I'm not going to listen to a word he says

ElfWdroH

Martin - direct

1 about legal argument.

2 MR. BUDWIN: That's a fair point. I'll wrap it up.

3 THE COURT: And you're paying for him.

4 MR. BUDWIN: I'll wrap it up briefly.

5 Q. So the discussion here is about location?

6 A. Yes.

7 Q. And in your expert opinion and in your review of the
8 Dickman reference, you would agree the Dickman reference is
9 talking about location?

10 A. Location represented in the URL, that's right.

11 Q. Not operating state?

12 A. That's right. Not operating state.

13 MR. BUDWIN: Let's take a look at another of the
14 alleged disclaimers, slide 42.

15 Q. This is the discussion of the LeMole reference, one of the
16 ones we talked about earlier, advertising, is that right?

17 A. That's correct. LeMole and advertising.

18 Q. And again, it says, "The bookmark is stored on the Web page
19 location or a URL on a browser, while a browser icon is a
20 picture that launches a picture application. All browser
21 elements that inform the browser program to locate certain
22 elements." Do you see that?

23 A. Yes, I do.

24 Q. Again, they're talking about location?

25 THE COURT: I'm sorry. Icons aren't interactive?

ElfWdroH

Martin - direct

1 When I click on an icon, something doesn't happen? That's
2 funny. When I click on icons, things happen on my computer.
3 Is my computer unique?

4 THE WITNESS: No. Icons can be links.

5 THE COURT: They can be links, they can be
6 interactive, can they not?

7 THE WITNESS: Absolutely, yes.

8 THE COURT: That's what I thought.

9 MR. BUDWIN: But, your Honor, I don't think --

10 THE COURT: No, no. Now you're having a conversation
11 with me. If you choose to ask him questions, then I get to ask
12 him follow-up questions. If you want to make legal arguments,
13 you make them later. Okay?

14 BY MR. BUDWIN:

15 Q. Dr. Martin, do you see the text where it says "special
16 browser icons are not the same as an interactive link as
17 claimed"?

18 A. Yes. Right above the highlighted block, it says, "special
19 browser icons are not the same as an interactive link as
20 claimed."

21 Q. Do you understand that statement to be saying --

22 THE COURT: No, I don't want to hear what you say it
23 says. Have you guys ever heard of a leading question, you
24 people on this side of the room? Are you familiar with that
25 concept?

ElfWdroH

Martin - direct

1 MR. BUDWIN: Yes, your Honor.

2 THE COURT: Good. Because I've let this go on for
3 like two hours. I want to hear him. So far, I've heard your
4 testimony with which he agrees. Okay? I'm not going to give
5 that a lot of weight, let me tell you that right now. As far
6 as I'm concerned, he hasn't testified. So if I were you, I'd
7 quit now and I'd let this man, who has credentials that you and
8 I do not, testify.

9 MR. BUDWIN: Yes, your Honor. Let me just wrap it up
10 then.

11 THE COURT: Don't wrap it up with a leading question.
12 And you, on your feet, as my partner Arthur Liman used to say,
13 hitting us on the back, "On your feet."

14 MR. SHATZER: Yes, your Honor.

15 THE COURT: Object.

16 You haven't done anything wrong.

17 THE WITNESS: Thank you, your Honor.

18 MR. BUDWIN: Dr. Martin, I appreciate your time and I
19 think we've hit the issues that we need to hit, your Honor, and
20 I'll pass the witness for cross-examination.

21 THE COURT: Okay.

22 CROSS-EXAMINATION

23 BY MR. SHATZER:

24 Q. Good morning, Dr. Martin.

25 A. Good morning.

ElfWdroH

Martin - cross

1 Q. We're going to have binders up there for the witness.

2 We're going to ask you about some documents, I want to make
3 sure you have them handy.

4 Dr. Martin, I'd like to start by looking at paragraph 28 of
5 your declaration. Do you see a binder there with your
6 declaration in it?

7 A. I see it.

8 Q. Could we go to paragraph 28?

9 A. Yes.

10 Q. In that paragraph, you discuss something called JavaScript,
11 correct?

12 A. Yes, I do.

13 Q. What is JavaScript?

14 A. JavaScript is a programming language that is available for
15 use in a Web browser.

16 Q. And you indicate in paragraph 28 that JavaScript can be
17 used for special effects and form validation in 1999, correct?

18 A. That's correct.

19 THE COURT: What does that mean?

20 THE WITNESS: So, what I went on to describe in the
21 declaration was an example of a special effect is, for
22 instance, when you use your mouse to drive the pointer over an
23 icon that you can click on but don't click on yet, the icon
24 might change color, indicating that it's clickable.

25 THE COURT: Okay.

ElfWdroH

Martin - cross

1 BY MR. SHATZER:

2 Q. At the end of paragraph 28, you talk about a JavaScript
3 application, right?

4 A. Yes.

5 Q. What's a JavaScript application?

6 A. A JavaScript application would be an application that
7 executes task for an end user.

8 Q. I'm sorry. Go ahead.

9 A. And is written in JavaScript.

10 Q. And JavaScript applications are run within a Web browser,
11 correct?

12 A. That's what I was describing here, yes.

13 Q. And JavaScripts ran within Web browsers in 1999, correct?

14 A. It depends on what you consider an application to be.

15 Q. We don't have to worry about that. The Court's told us
16 with respect to this patent what an application is, haven't
17 they? Didn't the Court, in its claim construction order, give
18 us a definition? Are you familiar with that?

19 A. Yes, I am.

20 Q. And the definition is a software program that executes
21 specific tasks for an end user, correct?

22 A. That's correct.

23 Q. So a JavaScript application meets that definition, does it
24 not?

25 A. Yes.

ElfWdroH

Martin - cross

1 Q. And JavaScript applications ran on browsers in 1999,
2 correct?

3 A. I think such applications did exist, yes.

4 Q. You talked a little bit in your direct about what you
5 called old Yahoo!, and we had a little video. Do you know what
6 I'm talking about when I say old Yahoo!? Can I use that
7 shorthand?

8 A. Sure.

9 Q. I believe you said, please correct me if I am wrong about
10 this, but I believe you said old Yahoo! was not an application,
11 is that right?

12 A. I don't recall if I used that exact phrasing.

13 THE COURT: I don't recall that you did either.

14 MR. SHATZER: Let me ask then.

15 Q. Was old Yahoo! an application?

16 A. I can see how it would be considered a server side
17 application, but not a client side application or a mixed
18 client/server application.

19 THE COURT: You mean it was an application under my
20 definition, but it's an application that ran on the server and
21 not on the client side?

22 THE WITNESS: That's exactly it, yes.

23 THE COURT: Okay. So it's an application, but it's
24 over there, not over here.

25 THE WITNESS: That's right.

ElfWdroH

Martin - cross

THE COURT: Okay.

BY MR. SHATZER:

Q. Would a browser in 1999 meet the Court's definition of an application?

A. Yes. I would say that a browser in isolation could, yes, would meet the Court's definition of application, in 1999.

Q. During your testimony today, you used the word "application" quite a bit. You talked about things that were applications, things that weren't applications. When you were giving that testimony, were you applying the Court's definition of application in each instance?

A. I believe I was, yes.

Q. You talked about Web sites and what they could do in 1999. Isn't it true that not all Web sites in 1999 required complete page refresh before providing new information?

A. That's true. Some other information could be shown without a complete page refresh, such as scrolling the page up and down, for instance.

THE COURT: You mean it wouldn't all appear on the screen, but I could make more of it appear on the screen by scrolling up and down?

THE WITNESS: Exactly.

THE COURT: Okay.

BY MR. SHATZER:

Q. Let's turn to paragraph ten of your declaration. The first

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Martin - cross

1 sentence reads: "In the years following 1999, Web browsers and
2 available computers became more powerful and their ability to
3 run applications within the Web browser became more practical."
4 But as we discussed before, it's true that even in 1999,
5 computers could run applications within the Web browser,
6 correct?

7 A. Correct.

8 Q. In fact, we just talked about JavaScript as an example of
9 that, correct?

10 A. A JavaScript application could be run in 1999, yes.

11 Q. The next sentence, paragraph ten, you refer to these new
12 applications, and I'm going to talk about them. You're talking
13 about these new applications; you're not talking about
14 JavaScript applications, right?

15 A. No. I am talking about these new applications that were
16 now more practical because of the improving technology.

17 Q. So you could do different things with JavaScript
18 applications, but they already existed, right?

19 A. As I said, yes, JavaScript applications existed in 1999.

20 Q. I'd like to talk now about what you referred to, I think,
21 as new Yahoo!. If I use that term, do you know what I'm
22 talking about, your second video?

23 A. I do, or modern Yahoo!, yes.

24 Q. Modern Yahoo!. Obviously it was your video, so if you need
25 your counsel to call it up for you, I have some questions for

ElfWdroH

Martin - cross

1 you. Perhaps there's something in your declaration you could
2 point me to, but my question is in the new Yahoo!, where is the
3 interactive link, in the modern Yahoo!?

4 A. Well, I did not set out to identify the interactive link
5 when I created that video, but in response to your question, I
6 would tentatively point to the URL, including the fragment
7 identifier that was shown in that video, as a candidate for the
8 interactive link.

9 Q. How does that URL with the fragment identifier facilitate
10 operating state?

11 A. If the operating state in question is the range of dates
12 over which the index graph is to be generated, then that
13 operating state information is encoded or appears to be encoded
14 in the fragment identifier portion of the URL.

15 Q. Just so I'm clear, when you use the term "operating state,"
16 what do you understand that to be?

17 A. As I described earlier, operating state determines what an
18 application is doing at a particular moment, as opposed to all
19 the things the application is possible of doing.

20 THE COURT: Okay.

21 THE WITNESS: Capable of doing.

22 THE COURT: Got it.

23 I may be oversimplifying. As you testified on direct,
24 and it did clear up some things. I now understand your
25 affidavit much better. Thank you. I got the impression that

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Martin - cross

1 by operating state, you were using that term synonymously with
2 a previous screen, going back to a screen that you had been on
3 before, and that's what you meant by restoring the operating
4 state. Is that what you meant by restoring operating state,
5 going back to a screen that had already appeared and that I'd
6 navigated away from?

7 THE WITNESS: That could be one way to look at it.
8 Yeah, that would count as restoring operating state. If, by
9 restoring that screen, you've taken the application back to a
10 state that you've desired to put it in, yeah.

11 THE COURT: Let me be crude about this. I'm checking
12 my Gmail. I navigate away from that to, because something
13 appears on the side about a weight loss product, an issue in
14 which I take great interest, and I click on that, and I read
15 about the weight loss product, and I want to go back to my
16 Gmail, and I click back on Gmail and, lo and behold, I'm back
17 with my e-mail. Have I restored an operating state, as you're
18 defining that term?

19 THE WITNESS: Potentially, yes. And I can add a
20 little more detail to make this, I think, easier to understand.

21 THE COURT: Thank you.

22 THE WITNESS: When you're looking at your Gmail
23 folder, you have different folders, your inbox and your junk
24 mail and maybe your other folders. So what I would point to as
25 operating state in that case is which folder you're currently

ElfWdroH

Martin - cross

1 looking at within the Gmail application.

2 THE COURT: If I go from inbox to trash to try to find
3 something that I've thrown in the trash but that's alluded to
4 in an e-mail. I'm navigating away from operating state A,
5 going into operating state B, and if I go back to my inbox,
6 I've restored the operating state?

7 THE WITNESS: That's correct.

8 THE COURT: Okay. Thank you.

9 THE WITNESS: You're welcome.

10 THE COURT: That's very helpful.

11 BY MR. SHATZER:

12 Q. How does modern Yahoo!'s URL allow restoring an operating
13 state, but the old Yahoo! does not? Is it just because one's
14 an application and the other's not?

15 A. It's because whether the application is running on the
16 client or not that provides the Yahoo! example. That's the
17 difference.

18 THE COURT: So the real difference here, and this, I
19 think, I asked you about when you were on direct, the real
20 difference here is where the application is. In 1999, it
21 wouldn't run on my computer; it would only run on the Yahoo!
22 server. But now there's a way to get an application to run on
23 this machine?

24 THE WITNESS: That's correct, yes.

25 THE COURT: And the Web browser I'm using. I'm using

ElfWdroH

Martin - cross

1 AOL as my Web browser. Yahoo! doesn't like that, but Yahoo!
2 doesn't care because it can send an application, and I can run
3 the application on this.

4 THE WITNESS: Yes.

5 BY MR. SHATZER:

6 Q. Just to follow up on the judge's questions, some
7 applications could be run -- so it's true though, following up
8 on the judge's question, that some applications could run in
9 the Web browser, even in 1999, like a JavaScript application,
10 right?

11 A. JavaScript applications could run in a Web browser in 1999,
12 for instance, a calculator application.

13 Q. And a person of ordinary skill in the art would have known
14 that in 1999?

15 THE COURT: What he said was a person of ordinary
16 skill would have known that.

17 There's no way she could have taken that down. It
18 came out as blah, blah, blah.

19 MR. SHATZER: It's one of our terms of art.

20 THE COURT: It's a term of art for you. Every day,
21 she has new terms of art.

22 Q. Dr. Martin, are you familiar with the term "session
23 identifier"?

24 A. Yes, sir, I am.

25 Q. What's a session identifier?

ElfWdroH

Martin - cross

1 A. A session identifier generally is a number or some other
2 string that is used to look up data in a database about a
3 particular session.

4 Q. And you would agree that prior to 1999, URLs could store
5 session data using session identifiers?

6 A. Generally speaking, yes. Session identifiers could be used
7 for shopping cart memory, for instance.

8 Q. And are you familiar, let's look at, actually, the errata
9 that Dr. Shamos filed to his declaration yesterday that refers
10 to the CDNow site. Are you familiar with that?

11 THE COURT: A site I never heard of.

12 BY MR. SHATZER:

13 Q. It should be in the very back of the larger binder you
14 have, the second-to-the-last tab.

15 A. I see it, yes.

16 Q. Do you see on the page where his signature is there's a
17 screen shot? Do you see that?

18 A. Yes, I do.

19 Q. And do you see that the text mode button on the bottom
20 right-hand corner of the page, there's a cursor over query?

21 A. I see it.

22 Q. Do you see that the URL for the hyperlink there contains an
23 SID number?

24 A. I see that, yes.

25 Q. And that's a session identifier, correct?

ElfWdroH

Martin - cross

1 A. It could be a session identifier.

2 Q. Do you see that it contains the characters DM equals T?

3 A. I see the URL contains those characters.

4 Q. And if I represented to you that this display mode equals
5 text, do you have any reason to disagree with that?

6 A. Well, I guess I don't know what it stands for, but I'm
7 willing to let you represent that. Sure.

8 THE COURT: If he doesn't know what it stands for, I'm
9 sure Dr. Shamos is going to have something to say about it.

10 BY MR. SHATZER:

11 Q. Do you understand, in December of 1996, that the CDNow
12 site, if I went on there and let's say I were going to search
13 for Beatles albums, would give my session a session identifier
14 so if I bookmarked that and I clicked on it, it would take me
15 back to the main CDNow page, it would take me back to my search
16 results for Beatles albums?

17 THE COURT: Do you have any familiarity with this
18 particular site?

19 THE WITNESS: Yes, I do. And I guess I don't remember
20 specifically what the 1997 Web site did, but that sounds
21 possible to me.

22 BY MR. SHATZER:

23 Q. Let me frame it another way. Pre-1999, a Web site could
24 use session identifiers in a way, and URLs, where, if I
25 bookmarked them, I could go back to a page I had visited

ElfWdroH

Martin - cross

1 before, like search results?

2 A. Yes. Whatever could be put in a bookmark, in a URL before
3 1999 could be stored in a bookmark, including a URL that
4 contained an SID number.

5 THE COURT: Anything that could be put in a URL in
6 1999 could get bookmarked, is that what you said?

7 THE WITNESS: Yes.

8 BY MR. SHATZER:

9 Q. Would you consider that session identifier taking me back
10 to my search results to be restoring operating state, previous
11 operating state?

12 A. Possibly, yes. It could be considered to restore a
13 previous operating state of the server side shopping cart
14 facility.

15 Q. Let's go to paragraph 19 of your declaration.

16 A. Paragraph 19, I have it.

17 Q. 19 and 20 are excerpts from what appear to be what I would
18 characterize as a chat discussion from the Internet, is that
19 fair?

20 A. I wouldn't call it a chat discussion, no.

21 Q. What would you call it?

22 A. I would call it a technical article post, possibly a blog
23 post, with comments.

24 Q. The author of the blog post is Mike Stenhouse, is that
25 right?

ElfWdroH

Martin - cross

1 A. That's right.

2 Q. Do you know Mike Stenhouse?

3 A. Not personally, no.

4 Q. Do you know if he was a person of ordinary skill in the art
5 in 1999, in the art we're talking about?

6 A. I hadn't thought of that before. I suspect that he is, but
7 I'm not sure one way or another, as I sit here.

8 Q. You cannot tell me anything, can you, sir, about
9 Mr. Stenhouse's qualifications as a person of ordinary skill in
10 the art, correct?

11 A. On the contrary. I can.

12 Q. Mr. Stenhouse, in paragraph 19, in this post, is talking
13 about discovering a solution to restoring a session state, is
14 that right?

15 A. Generally speaking, yes. He describes it, I believe, as
16 browser state.

17 THE COURT: That says I'm trying to restore the
18 session state.

19 THE WITNESS: Yes.

20 THE COURT: Part of my problem was with paragraphs 19
21 and 20. I didn't really understand. There was some different
22 terminology used.

23 THE WITNESS: You're right. I was looking at the
24 following page. Sessions there, yes.

25 BY MR. SHATZER:

ElfWdroH

Martin - cross

1 Q. And this blog post and discussion is dated 2005, correct?

2 A. That's correct.

3 Q. You don't know whether or not Mr. Stenhouse discovered this
4 solution in 2005 though, do you?

5 A. I'm not sure exactly when he discovered the solution. I
6 understood it to be in proximity to his writing this article
7 about it.

8 Q. Let's go to paragraph 20. You say, "The comments below
9 Mr. Stenhouse's explanation indicate that other Web developers
10 were generally unaware of this technique and that this use of
11 URLs and bookmarks was not generally known." By "this use of
12 URLs and bookmarks," what are you referring to specifically?

13 A. I'm referring to the use of the fragment identifier field
14 in the URL in order to store operating state of a JavaScript
15 application.

16 Q. And then you quote these comments. Who is Ignacio?

17 A. Ignacio is one of the commenters.

18 Q. And was Ignacio a person of ordinary skill in the pertinent
19 art of the '745 patent as of 1999?

20 A. It appears that Ignacio was capable of understanding the
21 technical explanation on this page. Whether that makes him a
22 person of ordinary skill in the art, I would lean towards that
23 direction, but I wouldn't definitively say that he is given to
24 own this.

25 Q. Isn't it true that all this tells us is that somebody we

ElfWdroH

Martin - cross

1 don't know named Ignacio, in 2005, learned about this solution
2 for the first time? It doesn't tell us what anyone of the
3 ordinary skill in the art knew about the solution in 1999, does
4 it?

5 A. I think it does contribute to that understanding because
6 what we have is a reader of this highly technical discussion
7 who seems to appreciate it.

8 Q. We don't know anything about this person other than his
9 first name, isn't that true?

10 A. Or possibly last name. I don't know.

11 Q. And then the comment on page nine, bridging over to page
12 ten, is from someone named Jim. Was Jim a person of ordinary
13 skill in the pertinent art of the '745 patent as of 1999?

14 A. Again, I would lean in that direction, but not knowing Jim,
15 I'd hesitate to say definitively.

16 Q. So this 2005 online exchange between semi-anonymous
17 commentators doesn't really tell us anything about the
18 question --

19 THE COURT: That's a perfect example of an
20 argumentative question.

21 MR. SHATZER: All right, your Honor. I'll withdraw
22 it.

23 THE COURT: Thank you.

24 MR. SHATZER: You're welcome.

25 Your Honor, may I have a moment to confer with my

ElfWdroH

Martin - cross

1 colleagues.

2 THE COURT: Sure.

3 BY MR. SHATZER:

4 Q. One last question. When you were comparing modern Yahoo!
5 with old Yahoo!, and you concluded that one was and one was not
6 an application that restored operating state, did you look at
7 the JavaScript code of the two to compare them?

8 A. No. I used an alternate technique.

9 Q. What was that?

10 A. In the old example, I disabled JavaScript altogether and
11 generated the graph that showed that the JavaScript application
12 did not exist or was not instrumentally involved in causing the
13 graph to appear in the old example.

14 MR. SHATZER: I have nothing further. Thank you.

15 THE WITNESS: You're welcome.

16 REDIRECT EXAMINATION

17 BY MR. BUDWIN:

18 Q. Just a few brief questions for you, Dr. Martin. We had a
19 couple of questions about JavaScript applications in 1999 and
20 you gave the example of a calculator, do you recall that?

21 A. Yes, I do.

22 Q. You got claim language shared from the patent, would that
23 example meet the claim language that's being shown?

24 THE COURT: You mean does a calculator fall within the
25 claim language?

ElfWdroH

Martin - redirect

1 MR. BUDWIN: Your Honor, the purpose of my question is
2 I want to understand whether or not this calculator that
3 Dr. Martin was describing was or wasn't a distributed
4 application. In this instance, what you're going to see is --

5 THE COURT: What I'm going to see is whatever he tells
6 me the answer is. I'd like to hear it from him before I hear
7 it from you.

8 BY MR. BUDWIN:

9 Q. Dr. Martin, do you recall being asked about JavaScript
10 applications in 1999?

11 A. Yes.

12 Q. And in particular, the calculator?

13 A. Yes.

14 Q. Is the calculator a JavaScript application or similar
15 applications that existed in 1999 relevant to the claims at
16 issue in this case?

17 A. The problem with those applications and applying them to
18 the claims is that -- well, there are many steps to the claims,
19 and I don't see the back and forth of information flow that
20 needs to happen to satisfy the claim as a whole.

21 Q. Then I have one other area of inquiry for you.

22 THE COURT: You mean the back and forth of information
23 from the server to this machine connected to my Web browser?

24 THE WITNESS: Yes, but more than that. In claim one,
25 for example, there is first information, second information,

ElfWdroH

Martin - redirect

1 third information. It's not just a simple, single back and
2 forth. There have to be multiple exchanges of data that are
3 recited in the claim.

4 BY MR. BUDWIN:

5 Q. Dr. Martin, you were asked some questions about session
6 identifiers. Do you recall that?

7 A. Yes, I do.

8 Q. What's the purpose of a session identifier?

9 A. The session identifier, as we were discussing earlier, is
10 used in order to remind a server side application of where it
11 was the last time this Web browser user did something with the
12 server, clicked on a link, or something like that.

13 Q. Is the fact that session identifiers existed and were used
14 by a server relevant to the question that you're endeavoring to
15 answer today?

16 THE COURT: Which is the definition of interactive
17 link, in case you've forgotten the question that he asked that
18 we have on the table today.

19 A. It's relevant, but it describes the strictly server side
20 part of the equation, as I understand it.

21 Q. Counsel asked you some questions about a CDNow Web site
22 from '96 and '97. Do you recall that?

23 A. Yes, I do.

24 Q. Is that discussed in the prosecution history?

25 A. That example is not discussed, no.

ElfWdroH

Martin - redirect

1 Q. Do you recall any arguments or disclaimers made by the
2 applicants about the CDNow Web page in 1996 or '97?

3 A. No, I don't.

4 Q. And even though you just got the updated declaration from
5 Dr. Shamos yesterday, have you reviewed that?

6 A. Yes, I have.

7 Q. And how would you describe CDNow in 1996 or 1997? How did
8 it work? How did it work?

9 A. So, the way CDNow worked was, as I described before, the
10 Web browser was used as essentially a viewing portal into the
11 Web server presentation of the CDNow Web site. So, yes, users
12 could browse music and buy albums. The session identifier was
13 most likely used in order to keep track of what is in a user's
14 shopping cart, for instance.

15 Q. Is that similar to the old Yahoo! example that we talked
16 about earlier?

17 A. Yeah, I find it similar in the sense that the information
18 in the session ID is really only of concern to the Web server
19 and not a client side application.

20 MR. BUDWIN: Thank you, Dr. Martin.

21 THE COURT: Anybody else have anything for Dr. Martin?

22 MR. SHATZER: Nothing.

23 MR. BUDWIN: No, your Honor.

24 MR. SHATZER: Nothing further, your Honor.

25 THE COURT: Thank you.

ElfWdroH

Martin - redirect

1 THE WITNESS: You're welcome.

2 (Witness excused)

3 THE COURT: It's 25 of one. I realize I interrupted
4 you all for half an hour, but I don't know if it makes sense to
5 start with Mr. Shamos or take an early hour for lunch and come
6 back in an hour.

7 MR. SHATZER: I think we'd prefer to break now, your
8 Honor, if we could.

9 THE COURT: I'll see you at quarter of two and I'll be
10 ready to go. Okay?

11 (Luncheon recess)

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ElfWdroH

Martin - redirect

AFTERNOON SESSION

THE COURT: Here we are again. Have a seat. Am I going to hear from Dr. Shamos now?

MR. SHATZER: Your Honor, defendants call Dr. Shamos.

MICHAEL IAN SHAMOS,

called as a witness by the Defendants,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHATZER:

Q. Could you please state your name.

THE COURT: He already did that.

BY MR. SHATZER:

Q. Dr. Shamos, could you very briefly tell us about your relevant background and expertise?

A. Yes. I've been involved with computers and computer programming for a little bit over 50 years. To condense a long story, making it very short, I think the relevant experience is that since 1998, I have been director or codirector of the graduate programs at Carnegie Mellon University in electronic commerce and e-business, all of which is very heavily Web oriented.

Q. Dr. Shamos, if you could, turn in your binder, I think it's the very last thing in the big binder, to the Court's claim construction decision.

ElfWdroH

Shamos - direct

1 A. Yes.

2 Q. And if you could, go to page 11, please.

3 A. I'm there.

4 Q. At the bottom, that's where the Court gave its core
5 definition of interactive link, which is "computer code that,
6 one, retrieves and presents applications and/or information,
7 stored at remote locations across the network when selected by
8 an end user; and, two, includes facilities for restoring
9 previous operating states of the application as the application
10 is re-presented at a user's computer." Do you see that?

11 A. Yes.

12 Q. If you could look at page 13, about the middle of the page,
13 is it your understanding the question before the Court today is
14 whether or not the Court should add to that construction the
15 following: "an interactive link cannot be a bookmark, cookie,
16 shortcut, hyperlink, or Internet address (URL)"?

17 A. Yes.

18 Q. Has the meaning of the terms "bookmark," "cookie,"
19 "shortcut," "hyperlink," or "URL" changed to one of ordinary
20 skill in the art since 1999?

21 A. No.

22 Q. Keeping in mind the Court's construction of interactive
23 link, would one of ordinary skill in the art understand the
24 capabilities of bookmarks, cookies, shortcut, hyperlinks, or
25 URLs to have materially changed since 1999?

ElfWdroH

Shamos - direct

1 A. No.

2 Q. Can you explain why that's the case?

3 A. Yes. So many of these things are the subject of Internet
4 standards. And those standards have been incorporated into
5 numerous pieces of software, including server software and
6 browser software. And so it is not a trivial matter to change
7 the way these things behave because it would cause a huge
8 amount of critical Internet software to be obsoleted. That
9 said, people can dream up new uses for these things, but that
10 doesn't change what those things are.

11 Q. In his opening, Mr. Reichman said that distributed
12 applications could not run on Web browsers in 1999. Is that
13 your understanding?

14 A. No, it's not, and maybe I ought to explain my understanding
15 of distributed application first. In a distributed
16 application, there's code that runs on at least two different
17 computers, and some of the processing is done on one computer
18 and some of the processing is done on another computer. In a
19 client/server environment, distributed application would mean
20 that the server is doing some of the work and the client is
21 doing some of the work. And as long as there is code, for
22 example, running on the browser, that is executing based on
23 information that's being received from the server, then some of
24 the processing is done on the server and some is done on the
25 client. And this is only with respect to Web browsers. I

ElfWdroH

Shamos - direct

1 mean, there were plenty of distributed applications not
2 involving browsers that ran over the Internet in 1999.

3 Q. Can you give some examples of Web browsers in 1999 that ran
4 distributed applications?

5 A. Yeah. I'm thinking that you probably didn't mean Web
6 browsers; you mean can I give you examples of applications that
7 were distributed that happen to run in a Web browser.

8 Q. Yes, when you put it that way.

9 A. Yes, there were many. So I used to teach, when I was
10 teaching a foundational course in electronic commerce. It was
11 called E-commerce Technologies, and I had lectures on various
12 technologies that one might bring to bear on, for e-commerce
13 Web sites, in order to sell things over the Internet. And one
14 of my favorite examples was one from a clothing retailer that
15 allowed you to shape in general a model of yourself on your own
16 browser. So it wouldn't capture your face, but it would
17 capture your overall proportions, and then when you picked an
18 article of clothing, it would choose the right size and it
19 would show you what that clothing would look like on a model
20 having your proportions.

21 Now, some of that processing is being done on the server
22 and some of the processing was being done on the client. So
23 there's a perfect example of a distributed application.

24 Q. Would JavaScript be another example of a distributed
25 application that would run on a Web browser in 1999?

ElfWdroH

Shamos - direct

1 A. In general. I think there were some dumbed-down ways of
2 using JavaScript which might not actually qualify as a
3 distributed application. For example, if everything that
4 JavaScript is doing is purely local to the browser and is not
5 communicating with the server, I'm not sure you'd call that a
6 distributed application. For example, if all you're doing is
7 mouse-overs, which the server never learns about, and all
8 you're doing is seeing that on your browser screen, but if the
9 server has relegated to the browser the responsibility for
10 doing substantive processing of the data, then it would be a
11 distributed application.

12 Q. And in 1999, JavaScript could do that?

13 A. Oh, yes, indeed. Not only could, it did, because there
14 were numerous Web sites that used that capability.

15 Q. To put it another way, is it true that in 1999, all a
16 browser could do was display a page?

17 A. Not at all.

18 Q. There was some testimony from Dr. Martin he had attached to
19 his declaration, an Ajax book. Is all the information from the
20 Ajax book that Dr. Martin cited in his direct testimony today
21 accurate, in your view?

22 A. No, and I sort of thought that we were being asked to
23 simply accept at face value what was going on in that book, and
24 I think the book makes a number of very sweeping statements
25 that, just by virtue of their sweepingness, are incorrect.

ElfWdroH

Shamos - direct

1 They talk about all Web sites did this and no Web site did
2 that, etc., without any evidence or any credible argument that
3 the author of the book was able to examine all Web sites. So
4 there were lots of statements of that kind that I simply don't
5 think should be accepted.

6 Q. There was some testimony earlier about MapQuest when
7 Dr. Martin testified. Do you recall that?

8 A. Yes.

9 Q. What, in your view, is the relevance of the fact -- let me
10 withdraw that.

11 What is the relevance to the question before the Court
12 today of the fact that MapQuest could be presented more
13 efficiently in 2005 than in 1999?

14 A. I don't see any.

15 Q. Why not?

16 A. Because it doesn't relate to any new use of any of the
17 constructs that are, that defendants seek to have added to the
18 disclaimer.

19 THE COURT: I'm not sure I understand that answer.

20 THE WITNESS: Okay. So there's a list of constructs.
21 URLs, bookmarks, cookies and shortcut, etc. And there is no
22 difference in any of those in the old MapQuest versus the new
23 MapQuest. All the constructs are exactly the same and they're
24 used for the same purpose. The shortcut is to get you back to
25 a particular page you were looking at. A URL is to both

ElfWdroH

Shamos - direct

1 request information from a server and also, for example, in a
2 query string, pass information from a client to a server. None
3 of those has changed going from the old MapQuest to new
4 MapQuest.

5 Q. To the extent it operates more efficiently, it doesn't have
6 anything to do with the URLs or the shortcuts or bookmarks?

7 A. I don't think so. No one is suggesting that the Web hasn't
8 improved and that computers haven't gotten faster and that we
9 don't have a lot more memory cheaply available now than we used
10 to. So that's given rise to people believing things are now
11 feasible simply because of the processing power that might not
12 have been feasible in older days when things were smaller. But
13 that has not changed the nature of or the usage of these
14 constructs that we're talking about.

15 Q. Is a browser an application under this Court's definition
16 of that term?

17 A. Yes.

18 Q. When a bookmark is selected on a browser, is any state of
19 the browser restored?

20 A. So --

21 THE COURT: Read the question again.

22 BY MR. SHATZER:

23 Q. When a bookmark is selected on a browser, is any state of
24 the browser restored?

25 A. So, state is an elusive concept. State refers to something

ElfWdroH

Shamos - direct

1 historical. If the aspect of history you're concerned about is
2 what page was being viewed, then when you save a bookmark that
3 marks that page and you later select that bookmark, you are
4 again looking at the page that you were previously viewing. So
5 there's some portion of state that is being saved and being
6 restored.

7 Q. Was that true in 1999?

8 A. Oh, yes.

9 Q. Let's talk a little bit about modern Yahoo! and old Yahoo!.
10 In the modern Yahoo! -- well, let me just be clear. When I say
11 modern Yahoo!, would you understand what I'm referring to from
12 Dr. Martin's testimony?

13 A. Yes, I think we're talking about the finance part of the
14 Yahoo! site that displays stock charts.

15 Q. Correct.

16 A. Yes.

17 Q. In the modern Yahoo! application, does the fragment
18 identifier that Dr. Martin identified store operating state?

19 A. I don't think anybody's pointed to a fragment identifier
20 that stores operating state anywhere in any of the examples
21 that were given.

22 Q. Based on your understanding of how the modern Yahoo!
23 application works, could it have been implemented in 1999?

24 A. Yes. Similar functionality could have been implemented.
25 It might not have been implemented in exactly the same way.

ElfWdroH

Shamos - direct

1 Q. Let's talk about old Yahoo! now. Did old Yahoo! allow
2 saving a date range for a stock chart?

3 A. Yes.

4 Q. Could a bookmark in 1999 show a page in a browser that had
5 previously been displayed?

6 A. Yes.

7 Q. In his direct testimony, Dr. Martin tried to draw the
8 distinction that he, let me say, tried to draw a distinction
9 between old Yahoo! and modern Yahoo!. Do you believe that
10 extensions that he was drawing are relevant to the question of
11 the meaning of interactive link to a person of ordinary skill
12 in 1999?

13 A. No.

14 Q. Why not?

15 A. The only difference between old Yahoo! and new Yahoo!, and
16 I want to make the point that both made extensive use of
17 JavaScript and, in fact, the amount of JavaScript in the old
18 and the new is just about the same in terms of number of bytes
19 of JavaScript, the -- in the interim, a more efficient way was
20 found of allowing one to navigate around the stock chart
21 without having to send, essentially to reload the page or to
22 send additional chart information. But from the point of view
23 of the processing that was going on in the browser with respect
24 to old Yahoo! and new Yahoo! and the saving of state, I don't
25 see substantive differences.

ElfWdroH

Shamos - direct

1 Q. Dr. Martin referred to the relevance of restoring operating
2 state. Do you recall him showing any examples of restoring an
3 operating state?

4 A. Well, so, there were certainly examples of restoring the
5 state. A state is an overall generic term of which operating
6 state is obviously a subset. Now, there hasn't been a
7 construction yet of operating state, and so I believe what was
8 shown is certainly saving pieces, components of operating
9 state, possibly not saving the entire operating state.

10 Q. Did Web pages in 1999 have embedded code that would be
11 executed by a browser?

12 A. Yes. JavaScript is an example of that.

13 Q. There was some testimony earlier about the Gish patent.
14 Are you familiar with that patent?

15 A. Only a little bit.

16 Q. But does the client application running in the Gish patent
17 have an operating state?

18 A. Yes. All applications have operating states.

19 Q. Could a URL or bookmark in 1999 be used in restoring
20 operating state?

21 A. This is a complicated question. And it depends on exactly
22 what's meant by operating state and whether operating state
23 means saving every conceivable relevant portion of the state.
24 Certainly portions of operating state would be easily restored,
25 easily stored, and would be restorable. Let me give an example

ElfWdroH

Shamos - direct

1 of that.

2 When I interact with, there are numerous Web sites that are
3 oriented toward international use so that people who speak
4 different languages can effectively still interact with the
5 site, and once you tell the site what language you would like
6 to talk to the site in, every time you visit that site again,
7 you will be presented with pages in your own language. So to a
8 certain extent, just the knowledge of what language you want to
9 interact with the site in is a form of state. That doesn't
10 mean that you can go back to exactly the same page and view it
11 in exactly the same way, or that if there were JavaScript
12 running in your browser, that all the variables in the
13 JavaScript would have exactly the same values when you came
14 back. So language is just a piece of state.

15 If you take the totality of all pieces of state that enable
16 you to go back and have what's running in the browser exactly
17 the same as what was running when you left off, then you've
18 reached, you've stored the entire operating state. Anything
19 less than that isn't the entire operating state. It's pieces
20 of it.

21 Q. As an expert and based on your review of Dr. Martin's
22 declaration and his testimony here today, what is your opinion
23 of the overall significance of Dr. Martin's testimony on the
24 issue of meaning of the term "interactive link" to a person of
25 ordinary skill in the art in 1999?

ElfWdroH

Shamos - direct

1 A. I don't think there is any. And the reason for that is
2 that we're talking about the meaning and capabilities of these
3 what I refer to as the constructs, which are the ones in the
4 putative disclaimer. Those haven't changed. So, I don't think
5 the plaintiff is happy with that, and so they have to show that
6 something, somewhere has changed in the interim. And there
7 have been changes. I mean, there are new technologies. There
8 are new uses that have been made of URLs in the meantime, but
9 that just doesn't change the fundamental nature of what
10 interactive link is.

11 MR. SHATZER: No further questions. I pass the
12 witness.

13 THE COURT: Can you talk to me a little bit -- this
14 was in your affidavit as well -- about these standards that you
15 say these constructs, or at least some of them, are subject to
16 certain standards, some body promulgates standards that would
17 make it difficult to change what it is that they mean or what
18 it is that they do? I'd like to hear more about that.

19 THE WITNESS: Certainly. So I think a very good
20 example is URL because URL is so universal. All browsers have
21 to understand URLs. Web servers have to understand URLs
22 because they're going to be getting them hundreds of thousands
23 or millions of times a second. We already know from, I think,
24 both of our declarations that there's something in URL called a
25 query string, and it begins with a question mark character.

ElfWdroH

Shamos - direct

1 And what follows the question mark character is the query
2 string that is passed in a uniform way to the Web server.

3 Now let's suppose I would like to change the format of
4 URLs and I'd like to add a new, special character with a
5 special substring in there, so I decide I want to add an
6 exclamation point as a delimiter that would indicate a
7 particular part of a URL. Well, I could do that and I could
8 implement it on my Web server and I could write a browser that
9 understood that exclamation point character, so my browser and
10 my Web server could talk to one another, but your Internet
11 Explorer browser or your Chrome browser would have no idea what
12 that exclamation point meant, and no other Web server in the
13 world would understand that. So I can't as a practical matter
14 do that the way I want to.

15 If I wanted to add, for example, such an exclamation
16 point character, I would create a request for comment. The
17 request for comment would be distributed to the Internet gurus
18 and then maybe after a time the World Wide Web consortium would
19 adopt that as a standard for URLs. Then I could actually
20 change what a URL was. But, in general, it's extremely
21 difficult to do that because it requires everybody who has a
22 browser or a server around the world to go and change their
23 code. That's what I mean by a standard and the difficulty of
24 changing a literal worldwide standard. I mean, it's used
25 everywhere.

ElfWdroH

Shamos - direct

1 THE COURT: Okay. Understood. URLs. It's the World
2 Wide Web consortium that sets these standards?

3 THE WITNESS: Sort of. Unfortunately, the
4 organization of the Internet is unlike any other.

5 THE COURT: A lot of cowboys out there, I understand.

6 THE WITNESS: So what happens is that standards
7 basically develop by acclamation. That is, somebody publishes
8 a request for comment, and people comment on it and they say,
9 well, this is a terrible idea for the following reasons, and if
10 the naysayer carries the day, then the request for comment
11 never gets adopted by everybody. But after a period of time,
12 if there's endorsement of the idea, then eventually, the people
13 who produce Web browsers, Web servers, and other Internet
14 software will essentially adopt the recommendations in the RFC.
15 And there have been many thousands of RFCs. Some of them have
16 gone nowhere and some of them are critically important.

17 THE COURT: Kind of like Wikipedia.

18 THE WITNESS: In a certain sense, I understand that,
19 because anybody can generate an RFC, if you'd like to, and
20 anybody could make a Wikipedia entry, if they would like to.

21 THE COURT: In reading your affidavit, it looked to me
22 like, at least with respect to URLs and one other, one of the
23 other terms --

24 THE WITNESS: There are bookmarks --

25 THE COURT: It looked to me like you were saying that

ElfWdroH

Shamos - direct

1 there was some standard, let me see if I can find this.

2 THE WITNESS: Well, hyperlink is the same.

3 THE COURT: Hyperlink. That was it.

4 THE WITNESS: Yes. Essentially, a hyperlink is an
5 embedded URL.

6 THE COURT: "In 1994, the network working group of the
7 Internet engineering task force adopted certain standards for
8 the URL." That's paragraph 36 of your affidavit. What's the
9 network working group of Internet engineering task force?

10 THE WITNESS: Well, as I said, there's a distributed
11 control, or let's say distributed noncontrol, over the Internet
12 and there are a number of organizations that have interest in
13 what goes on in the Internet, and one of them is the W3C
14 consortium, World Wide Web consortium. Another is a group of
15 known specialists in Internet technology comprising the
16 Internet engineering task force. And, fundamentally, they give
17 their blessing to the standards that have been proposed in
18 RFCs.

19 THE COURT: Okay. So they've given a blessing to a
20 concept that is URL.

21 THE WITNESS: Well, I think it's more than a concept.
22 It's rules about what can be and what can't be in the URL, how
23 long URLs are, how URLs are used.

24 THE COURT: As you say, "the standards of this
25 document prescribe the syntax and semantics for a compact

ElfWdroH

Shamos - direct

1 screen representation for a resource available called the
2 uniform resource locator." And did that same group do
3 something with respect to hyperlinks?

4 THE WITNESS: It's the same group that blesses the
5 other RFCs.

6 THE COURT: Same. Okay. And so, are you saying to me
7 that between 1999 and 2008, the group that gives its'
8 imprimatur to these concepts did not give an imprimatur to any
9 kind of fundamental change in URL or hyperlink or cookie, or
10 any of those terms that we're talking about?

11 THE WITNESS: That's correct.

12 THE COURT: Okay. That cleared that up for me.

13 MR. SHATZER: Could I ask a couple of follow-ups.

14 THE COURT: It's your witness.

15 BY MR. SHATZER:

16 Q. Just to follow up on the judge's questions, most
17 particularly Dr. Martin is relying on the use of a fragment
18 identifier for the changes he's talking about. Were fragment
19 identifiers a recognized part of URL strings in 1999?

20 A. Yes.

21 Q. Has there been any change since 1999 through 2008 to how
22 fragment strings were used in URLs?

23 A. Well, when you say how they were used --

24 Q. Sorry. Let me withdraw that.

25 Is there any change in their functionality in the URL?

ElfWdroH

Shamos - direct

1 A. So the function of a fragment identifier is to point a
2 browser to a particular content to display. As Dr. Martin
3 points out in his declaration, people have figured out ways of
4 sticking things into the fragment identifier field in a URL
5 purely within the browser so that information can be
6 essentially stored. It's like a storage location. You can
7 fiddle with that fragment without causing a page reload. So
8 there are certain efficiencies that are achieved by doing that.
9 But the fundamental nature of what a fragment identifier is
10 hasn't changed. A fragment identifier points to a particular
11 part of the page that you want displayed by your browser.

12 Q. And it did that in 1999?

13 A. Yes, that was the original purpose of the fragment
14 identifier.

15 MR. SHATZER: No further questions.

16 CROSS-EXAMINATION

17 BY MR. BUDWIN:

18 Q. Good afternoon, Dr. Shamos. My name is Josh Budwin. We
19 haven't met before. Nice to meet you. I guess this is not the
20 best way to do it.

21 A. Hello. How are you? I'll shake your hand later.

22 Q. You're a lawyer, is that right?

23 A. Yes.

24 Q. Your license is active today?

25 A. Yes, it is.

ElfWdroH

Shamos - cross

1 Q. Would you agree with me that the automobile has existed for
2 more than a hundred years?

3 A. Yes.

4 Q. And if I were to go back to 1900 and look at the definition
5 for an automobile, it might say something like conveyance
6 powered by an engine with four wheels?

7 A. Hypothetically, it might.

8 Q. Same definition might apply to an automobile today?

9 A. Hypothetically, it might.

10 Q. Would you agree or disagree that the capability and use put
11 to automobiles has materially changed in the last hundred
12 years?

13 A. Not necessarily. I get in an automobile in one place and I
14 drive it to another place. They may go much faster now. They
15 may use more efficient fuels. They may be electrically
16 powered, but it sounds to me like it's still an automobile.

17 Q. Don't you think that you just made my point for me, that
18 the functioning capability of an automobile has changed even if
19 the high-level, broad definition of that concept is the same,
20 they may be more fuel efficient, they may have more power --

21 THE COURT: The function hasn't changed in my
22 lifetime, which is 62 years. The function of the automobile
23 has not changed. Okay? I'm prepared to make that finding.
24 The function of an automobile has not changed.

25 MR. BUDWIN: All right.

ElfWdroH

Shamos - cross

1 THE COURT: If you want to talk about the capability
2 of an automobile, that may be a different question. But every
3 time you ask function and capability, I can understand why the
4 gentleman answers the question as he does, because the function
5 of the automobile has not changed.

6 BY MR. BUDWIN:

7 Q. Let's move on and let's pick up exactly where the Court was
8 asking you some questions about standard-setting activities.
9 You have a copy of your declaration in front of you with the
10 exhibits, correct?

11 A. I do. I have it in my binder. Is it also in the cross
12 binder?

13 Q. Why don't you look at your binder. In particular, the
14 Court, do you need a second to find it?

15 A. One moment. Yes, I have.

16 Q. In particular, the Court was asking you about paragraph 36.

17 A. Yes.

18 Q. The reference to URL and then there's a cite to Exhibit L.

19 A. Yes.

20 Q. Exhibit L to your declaration is request for comment,
21 correct?

22 A. Yes.

23 Q. It's request for comment 1738?

24 A. Yes.

25 Q. A request for comment and standard are not the same thing,

ElfWdroH

Shamos - cross

1 you would agree with that, right?

2 A. Yes.

3 Q. And do you know whether the Federal Circuit has spoken in
4 previous cases to the applicability of not just requests for
5 comment at the W3C but to the applicability of this specific
6 RFC, RFC-1738, to claim construction?

7 MR. SHATZER: Objection, to the extent that this
8 witness isn't here testifying as a lawyer.

9 THE COURT: I'm sorry. I'm two steps behind. Where
10 are we in the cross binder?

11 MR. BUDWIN: We are looking at tab 14.

12 THE COURT: Tab 14?

13 MR. BUDWIN: Paragraph 36.

14 THE COURT: This is just his affidavit, right?

15 MR. BUDWIN: Yes, your Honor, and he's got a cite in
16 paragraph 36 to Exhibit L. And I've asked the witness --

17 THE COURT: Are you asking him to look at Exhibit L?
18 Where is Exhibit L?

19 MR. BUDWIN: It's going to be in the binder that has
20 Dr. Shamos's declaration. It would be the white binder.

21 THE WITNESS: The thick white binder. Yes. And I
22 think it's at tab L.

23 THE COURT: Thanks.

24 BY MR. BUDWIN:

25 Q. So you agree with me Exhibit L is request for comment 1738?

ElfWdroH

Shamos - cross

1 A. Yes.

2 Q. And you would agree with me that a request for comment at
3 the W3C is different from a standard at the W3C?

4 A. It is not necessarily a standard.

5 Q. My question to you is whether you know if the Federal
6 Circuit has case law that addresses the applicability of
7 request for comment and, in particular, request for comment
8 1738, to claim construction?

9 MR. SHATZER: Objection. The witness is a lawyer, but
10 he's not here testifying as a lawyer. He's testifying as an
11 expert. I think that's a legal question, your Honor.

12 THE COURT: The objection is overruled. I'm curious.
13 Because one of the things I picked up on in his affidavit was
14 this notion of standards, and, frankly, to me, little layperson
15 that I am, if there really are standards and they haven't
16 changed over time, I find that very salient. So if there's a
17 way of undermining his testimony about standards, I will
18 certainly allow Droplets to try and undermine it.

19 A. The answer is I don't know what the Federal Circuit said
20 and I don't know the context in which they said whatever they
21 said.

22 Q. Would you agree or disagree that the purpose of a request
23 for comment like RFC-1738 is to collect commentary and to
24 select language to facilitate a common understanding from a
25 variety of competing technologies in a variety of potentially

ElfWdroH

Shamos - cross

1 competing interests? Do you agree with that?

2 A. Yes, with the objective of achieving a common acceptance of
3 what's in the RFC so it may become standard.

4 MR. BUDWIN: Your Honor, we do have a case. I can
5 provide the case cite and hand a copy of it up to your Honor
6 later. It deals with this particular RFC in the context of
7 claim construction and says it's less helpful than treatises or
8 dictionaries. That cite is ACTV v. Disney.

9 THE COURT: Fine. Treatises and dictionary aren't
10 your strongest evidence. They're the strongest evidence for
11 the other side.

12 MR. BUDWIN: 346 F.3d.

13 THE COURT: If all we're talking about were treatises
14 and dictionaries, you would have lost on this a long time ago.

15 MR. BUDWIN: 1082.

16 THE COURT: Okay.

17 BY MR. BUDWIN:

18 Q. But, at the end of the day, you would agree with me request
19 for comment is not the same as an adopted standard?

20 A. A request for comment can become a standard. They don't
21 all become standards.

22 Q. And I think if the request for comment that you're citing
23 in your declaration became a standard, we could expect you to
24 cite the standard and not the request for comment?

25 A. Not necessarily.

ElfWdroH

Shamos - cross

1 Q. Did you agree with any of Dr. Martin's testimony at all?

2 A. He spelled his name correctly.

3 Q. Beyond that --

4 A. No. He said many, main things. He testified for two
5 hours. I'm sure he said plenty of things that were correct and
6 that I agreed with. I just don't remember them all.

7 Q. Did you agree or do you agree that MapQuest evolved in the
8 way that Dr. Martin described and the way that it's discussed
9 in this Ajax book?

10 A. I agreed with that, yes.

11 Q. And do you agree that Yahoo! evolved in the way that
12 Dr. Martin explained and showed to you and the Court?

13 A. Well, I'm not sure what your definition of evolution is,
14 but MapQuest back then was not identical to the way MapQuest is
15 now. So it's certainly changed.

16 Q. I moved on. I was asking about Yahoo!

17 A. Yahoo!, MapQuest, all of them, I'm not sure evolved is the
18 right word. There are differences between MapQuest today and
19 MapQuest in the older days, 1999 time frame.

20 Q. Did you agree or disagree with Dr. Martin's testimony about
21 the way what we've called old Yahoo! and new Yahoo! worked?

22 A. The way --

23 THE COURT: I have to say, looking at my notes about
24 the direct, isn't it fair to say that you agree with some of
25 the things he said and not with other things that he said?

ElfWdroH

Shamos - cross

1 THE WITNESS: I think that's a perfect description of
2 it. Yes.

3 THE COURT: We already asked him. Dr. Shamos says
4 fragment identifier doesn't store operating state, but
5 Dr. Martin said that it does. So?

6 BY MR. BUDWIN:

7 Q. You talked about some generic applications that you said
8 existed prior to 1999 and were distributed applications and
9 gave an example of a clothes picker.

10 A. No. I didn't refer to those as generic applications. I
11 did use the word "generic" in a different context. That was a
12 very specific application.

13 Q. You talked about a clothes picker on your direct?

14 A. Yes.

15 Q. What Web site was it on?

16 A. I don't recall.

17 Q. Do you have the code for that?

18 A. I may, I may have archived it.

19 Q. Cited in your declaration, have we had a chance to review
20 it?

21 A. No, it's not in my declaration.

22 Q. And you also referred to 1999 JavaScript as distributed
23 applications. Do you recall that?

24 A. Yes.

25 Q. Again, did you provide any of those examples in your

ElfWdroH

Shamos - cross

1 declaration?

2 A. No. Dr. Martin did. Old Yahoo! is an example of that.

3 Q. Now, you took issue with some of the descriptions in this
4 Ajax book of the way all Web sites worked or no Web sites
5 worked, or something of that nature, didn't you?

6 A. Yes.

7 Q. Have you brought forth any contrary authoritative evidence
8 in the form of a book, treatise, something other than your
9 testimony, that would support that the statements in this book
10 are incorrect?

11 A. When you say brought forth, I had no opportunity to bring
12 forth because those declarations were filed simultaneously.

13 Q. You submitted a declaration yesterday, didn't you,
14 Dr. Shamos?

15 A. Yes.

16 THE COURT: This is not persuasive to me. This is
17 exactly the kind of cross-examination that makes me sick.
18 Okay? It doesn't persuade me of anything. All right?

19 Here's what happened. You guys were told by me to
20 have simultaneous expert declarations. Nobody responded to
21 anything, and the only thing that got submitted yesterday was a
22 correction, an errata. All right? So as far as I'm concerned,
23 the defendants did exactly what I told them to do, and I'm
24 underwhelmed by cross-examination that says, Hey, you didn't
25 dispute this, did you. Well, that's not what I asked. I have

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Shamos - cross

1 them here on the stand so that you can ask real questions,
2 substantive questions. That's the point of this hearing, is to
3 have you ask substantive questions so that people can
4 supplement testimony and their testimony can be challenged. So
5 get rid of all questions like the ones you have just asked.

6 MR. BUDWIN: Yes, your Honor.

7 Q. Dr. Shamos, would you agree or disagree that prior to the
8 mid-2000s, the Web was stateless?

9 A. No. That's one of the statements that I definitely
10 disagree with.

11 Q. Do you have the cross binder in front of you, Exhibit 4?

12 A. Yes.

13 Q. Just take a look at that.

14 A. You mean tab four?

15 Q. Yes, please.

16 A. Yes.

17 MR. SHATZER: Do you have a reference to that? I'm
18 without a binder.

19 MR. BUDWIN: It's going to be the Winkler blog post.

20 Q. Do you have that exhibit, Dr. Shamos?

21 A. Yes.

22 MR. SHATZER: Your Honor, we don't have that exhibit.
23 We don't have a cross binder. I'm not sure what he's referring
24 to.

25 THE COURT: He's referring to what says "in the

ElfWdroH

Shamos - cross

1 beginning." Very biblical, in the beginning, the Web was
2 stateless, on something called Tech Block.

3 BY MR. BUDWIN:

4 Q. You would disagree with the statements that are being made
5 in this blog post?

6 A. Not just disagree. I'm extremely familiar with the issue
7 and attempts to solve the problem of statelessness, and there
8 were effective solutions to it in 1994. So the idea that,
9 okay, when you say in the beginning, if the beginning was the
10 day after Tim Berners invented the World Wide Web, maybe it was
11 stateless that next day, but it certainly wasn't stateless in
12 1999.

13 Q. Have you provided us, in your declaration, any evidence in
14 support --

15 THE COURT: Like I said, I'm underwhelmed by those
16 questions. You're not filtering correctly.

17 BY MR. BUDWIN:

18 Q. Dr. Shamos, we can all agree that URLs, hyperlinks,
19 bookmarks, cookies, shortcuts, existed in 1999? You agree with
20 that?

21 A. I don't know if we can all agree. I certainly agree.

22 Q. You agree?

23 A. Yes. I don't know what the other people think. But I
24 think that.

25 Q. And to you in your testimony, those things have the same

ElfWdroH

Shamos - cross

1 meaning and the same function and capability today as they did
2 in 1999?

3 A. Yes.

4 Q. And you would disagree that the function and capability of
5 URL, hyperlinks, bookmarks, you would disagree that those have
6 changed between 1999 --

7 A. I agree that people have found new ways of using them. For
8 example, the query string in a URL, query string is an
9 arbitrary string that follows an Internet resource limited only
10 by length and character set.

11 Q. So you --

12 A. Let me finish.

13 Q. Sorry. I didn't mean to interrupt you.

14 A. Once I can pass data from a client to a server, it is
15 limited only by human imagination what one might do with that
16 capability, and so certainly people are constantly dreaming up
17 new ways to use the query string. That has not changed what a
18 URL is or what a query string is.

19 Q. Would you agree then there are new uses or functionalities
20 that URLs and the query string portion of URLs is being put to
21 today than what they were being put to in 1999?

22 A. I'll certainly agree with new uses. I don't agree with
23 functionality, and the reason for that is that the function of
24 a URL is to pass the address of an Internet resource to a
25 server along with certain other fields, for example, the query

ElfWdroH

Shamos - cross

1 string. That's its function. That hasn't changed.

2 Q. If we were to look at the Court's core definition of the
3 interactive link term, there's two parts. The first part is
4 retrieving and presenting information and the second part is
5 restoring previous operating states.

6 A. Yes, let me get that.

7 Q. We could show it. I think it's on slide three or two.

8 A. Yes.

9 Q. Now, can you, or would you, agree that URLs, bookmarks,
10 hyperlinks, shortcuts, as they have existed since 1999, would
11 meet the first part of this definition, the location part?

12 A. Yes.

13 Q. Would you agree with me that not all links, URLs,
14 bookmarks, hyperlinks, and shortcuts meet the second part of
15 the definition?

16 A. I guess it depends what you mean by previous operating
17 state. If it's simply reloading a page that was previously
18 loaded earlier, then I think all bookmarks do that.

19 Q. How are you using the term "operating state" in this
20 definition, Dr. Shamos?

21 A. I'm not. This is the first that you've thrown it up on the
22 screen and asked me about it.

23 Q. What's your understanding of the term "operating state" in
24 this definition?

25 A. Okay. So I said earlier the operating state has not been

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Shamos - cross

1 subject to construction. I gave an explanation of the
2 difference between the overarching term "state" and operating
3 state and the difference between complete operating state and
4 pieces of operating state. That's as far as I've gone.

5 Q. What's your understanding of the term "operating state" in
6 this construction, if you have one? How would you define it?
7 How would you use it as one of ordinary skill in the art?

8 A. To me, as one of ordinary skill in the art, if you say I
9 want to capture the operating state of an application, then I
10 understand that an application has executable code that is
11 executed. If you interrupt the processing of an application
12 and you want to save enough state so that you can restore the
13 application to exactly the condition it was in at the time of
14 interruption, then you have saved its operating state. If you
15 save less than that, then you've saved pieces of operating
16 state, not the entire operating state.

17 Q. And so in your understanding, operating state refers to
18 restoring the entirety of an application state, not just some
19 portion of it?

20 A. Well, it, I would refer to that as complete operating the
21 state. It may not be that the complete operating state is
22 relevant. It may not matter. For example, if the user does
23 not rely on the totality of the functionality of the
24 application, but only components of it, then it may be enough
25 to capture a portion of the operating state. Here's an example

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Shamos - cross

1 of that.

2 Let's suppose I bookmark a page and then later on, I select
3 that, you know, two months later, and I select that bookmark.
4 And let's say the Web page on the server hasn't changed in the
5 meantime; it's exactly the same. It's brought back into my
6 browser, so, from my point of view, I'm looking at the same
7 page. That has restored a portion of the operating state of my
8 browser because there's more to the state. When I left off two
9 months earlier, I had a browsing history. I could hit the back
10 button over and over and over again and I could get back to the
11 previous pages.

12 When I bookmark a page, I don't save my entire browsing
13 history. So two months from now, if I reload that page, let's
14 say I open the browser, no browsing history, this is initial
15 execution of the browser, I select the bookmark, the page comes
16 up, if I hit back, it won't go anywhere. The browsing history
17 was not saved. So is browsing history part of the operating
18 state or not part of the operating state?

19 Q. Dr. Shamos, using your understanding of operating state,
20 would you agree that not all links, URLs, bookmarks, and
21 hyperlinks meet the second part of the Court's definition, that
22 have the facility of restoring previous operating state?

23 A. Yes.

24 Q. Now, in your declaration and your testimony, you talked
25 about CDNow and the Yahoo! examples.

ElfWdroH

Shamos - cross

1 A. Yes.

2 Q. Those aren't examples of prior art that was being discussed
3 in the prosecution history?

4 A. I don't think so.

5 Q. You didn't see any disclaimers made by the applicants about
6 how CDNow page operates Yahoo! Web page operated?

7 A. I don't recall any such.

8 Q. Now, have you identified or are you aware of anything
9 existing in the prior art, the patent, that you would
10 characterize as an interactive link under the Court's core
11 definition of that term?

12 A. I haven't looked.

13 Q. Would you characterize any part of your CDNow example or
14 your Yahoo! example, the ones that existed prior to 1999, as
15 meeting the Court's definition, core definition of interactive
16 link?

17 A. Sure. Depends on what operating state means. If operating
18 state is restoring a page that I was previously viewing, then
19 there were plenty of interactive links that did that.

20 Q. Could be almost any Web page at the time, under that
21 definition?

22 A. Yes. If that's operating state, then, yes.

23 Q. Now, you said you reviewed references that were discussed
24 in the prosecution, Gish, ICE-T, LeMole?

25 A. I didn't say that. You said that. I reviewed LeMole.

ElfWdroH

Shamos - cross

1 Q. Did you review Gish and ICE-T?

2 A. No. My only knowledge of those is what I saw today.

3 Q. It's your understanding that in looking at a disclaimer, we
4 need to look at the prior art of the applicants
5 distinguishing --

6 MR. SHATZER: Objection to the form. Incorrect
7 statement of the law, your Honor.

8 THE COURT: The objection to the form I'll sustain.
9 Just ask the man a question.

10 BY MR. BUDWIN:

11 Q. You haven't reviewed Gish or ICE-T or LeMole or any of the
12 prior art in the prosecution history in enough detail to tell
13 us whether, in your opinion, those references have an
14 interactive link under the Court's definition?

15 A. I wasn't asked to do that, but if this case ever moves to
16 the invalidity phase, I suppose I will be asked to do that.

17 Q. So at this stage, you're not prepared to answer questions
18 about those specific references?

19 A. That's right. We don't even have a construction yet of
20 interactive link. That's what we're here today about.

21 Q. Now, you're aware, aren't you, that the patent office
22 allowed the patent to issue over the prior art of record in
23 part because the prior art of record didn't have interactive
24 link?

25 THE COURT: You know --

ElfWdroH

Shamos - cross

1 A. I suppose.

2 THE COURT: Oh, never mind.

3 BY MR. BUDWIN:

4 Q. Did you think it would be helpful to answer the questions
5 being presented today to study those references so that we
6 could determine whether or not --

7 THE COURT: Another question that you should have
8 pared.

9 BY MR. BUDWIN:

10 Q. Dr. Shamos, in your declaration submitted yesterday, you
11 talked about something called session state?

12 A. Yes.

13 Q. Is session state the same as or different than operating
14 state?

15 A. I think it's different, but operating state can include
16 session state.

17 THE COURT: Just so I know, what is session state?

18 THE WITNESS: Okay. So the whole notion of state
19 refers to history because we use state to go back to a
20 particular point in time. And when you go to a Web site, for
21 example, typically you will look at the home page and you will
22 then click on hyperlink, go to some other page, click an on
23 another link, etc. The history of the pages that you visited
24 is the session.

25 And in the old days, before people figured out how to

ElfWdroH

Shamos - cross

1 keep sessions within a sequence of HTTP requests and responses,
2 when you made the second request to the Web browser, it didn't
3 know that it was you that had made the first request. It's
4 just responding to everybody's request, Give me this page, give
5 me this page, give me this page. That would be useless in an
6 online shopping environment where, for example, you're putting
7 things in your shopping cart. If you forgot what was in your
8 cart, you would never be able to buy anything. So a mechanism
9 had to be found so that the Web server could recognize all of
10 the previous interactions that you had had with it during that
11 session. It might forget about those after a week or a month,
12 but at least what was going on today, it ought to remember.

13 So session state doesn't directly have to do with the
14 state of an application running on a client. It has to do with
15 the state of interaction between the client and the server.
16 And so that's what's normally meant by session state.

17 On the other hand, if the session is being completely
18 mediated by the client's software, then session state and
19 operating state are very close to one another.

20 BY MR. BUDWIN:

21 Q. Session state is a concept that's been in the art for
22 sometime, since prior to 1999?

23 A. Yes.

24 Q. Did you see any discussion in your review of the file
25 history of the alleged disclaimers about session states?

ElfWdroH

Shamos - cross

1 A. I don't recall any.

2 Q. Now, I want to show you some of the alleged disclaimers,
3 the same ones I was using with Dr. Martin.

4 MR. BUDWIN: Could we see slide 39.

5 Q. And have you reviewed, you've reviewed the applicant's
6 arguments, correct?

7 A. Yes.

8 Q. Do you recall the applicants in any of the arguments that
9 they were making to the patent office in light of the prior art
10 that was specifically of record arguing or suggesting that the
11 prior arts -- Gish, ICE-T, LeMole -- actually had operating
12 states? Do you remember any argument to that effect,
13 suggestion?

14 A. No. But, it seems to me that if the applicants didn't
15 think that the prior art references showed that, they wouldn't
16 have needed a disclaimer, because they would have been able to
17 distinguish their invention from those prior references.

18 Q. That's kind of the heart of my question. Isn't that the
19 basis, would you agree that the basis on which the applicants
20 are distinguishing the prior art of record is by the fact that
21 the prior art of record lacks the ability to restore a prior
22 operating state?

23 A. No.

24 Q. Let's look --

25 A. It doesn't say that.

ElfWdroH

Shamos - cross

1 Q. At slide 39. This is one of the disclaimers being pointed
2 to about Dickman. There's a discussion here that says "URLs or
3 other location information cannot perform the functions of
4 interactive links as claimed." That's what the applicant's
5 saying, right?

6 A. Yeah, I think the applicant's wrong, but the applicant said
7 that.

8 Q. And this is what we need to look at in order to determine
9 what the scope of the alleged disclaimer is, so the applicant
10 is actually telling the patent office?

11 A. I understand that that's a matter of law.

12 Q. Now --

13 A. As to what we ought to be looking at to determine the scope
14 of the disclaimer.

15 Q. You would agree with me that URLs and links have location
16 information; that's a characteristic of all URLs and links?

17 A. Yes.

18 Q. And I believe you agreed with me earlier that not all URLs,
19 links, bookmarks, hyperlinks -- not all of them -- have
20 operating state information, isn't that right?

21 A. Yes.

22 MR. BUDWIN: No further questions. Thank you.

23 MR. SHATZER: I have nothing further, your Honor.

24 THE COURT: I do.

25 Would you read back the last question and answer.

ElfWdroH

Shamos - cross

1 (Record read)

2 THE COURT: So?

3 THE WITNESS: I wanted to say so what when he asked me
4 that, but I thought it would be impolite, your Honor.

5 THE COURT: Okay. I guess I'll ask him. So?

6 MR. BUDWIN: Your Honor, would you like me to go back
7 to the podium?

8 THE COURT: No.

9 MR. BUDWIN: Your Honor, the point is when we're
10 looking at a disclaimer, we need to look at what the applicant
11 actually said and what the art of record actually teaches.

12 Here, the applicant is distinguishing this prior art
13 because the applicant's saying the URLs, the links, the
14 bookmarks, the hyperlinks, the things that are actually in
15 these references, all they do is point to a location. That's
16 it. They lack the facility of an interactive link, as your
17 Honor has construed that term and as the applicants, consistent
18 with the specification, to restore a previous operating state.
19 That is the point.

20 The prior art is distinguished on the basis of the
21 fact that the prior art is only talking about location. That's
22 a characteristic of all links, all URLs, all hyperlinks. They
23 all talk about location. But not all links, URLs, hyperlinks,
24 bookmarks -- not all of them -- have the facility for restoring
25 a previous operating state.

ElfWdroH

Shamos - cross

1 THE COURT: That, of course, is not what this says.

2 MR. BUDWIN: I would beg to differ, your Honor.

3 THE COURT: This doesn't say Internet shortcuts
4 encapsulate URLs or other locator information and not all of
5 them can perform the function of interactive links.

6 MR. BUDWIN: It says, and cannot.

7 THE COURT: No. It says and cannot. It doesn't say
8 not all of them cannot. It certainly implies that none of them
9 can perform the functions of Internet active links, as claimed,
10 with which this particular witness disagrees. Now, he
11 disagrees most vehemently and he gives me examples.

12 MR. BUDWIN: Your Honor, I would beg to differ,
13 respectfully. They're talking about a specific reference here,
14 the Dickman reference. There is a cite to that, and what
15 they're saying is the Internet shortcuts encapsulate URLs or
16 other location information. They're talking about and they're
17 citing the specific URLs and Internet shortcuts that are being
18 described in that specific reference, in that Dickman
19 reference. And when we go and we look at the Dickman
20 reference, we can confirm that those links and URLs, all they
21 are is location information. That's it. And those specific
22 URLs cannot perform the functions of the interactive link as
23 claimed precisely because they lack the facility to restore the
24 prior operating state. That is the argument that's being made,
25 and that's the disclaimer that's being made, and the core

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Shamos - cross

1 definition of this term that your Honor has already given us is
2 sufficient to distinguish all of the prior art in the
3 prosecution history.

4 I think the fallacy of the argument is that the
5 applicants are not making broad, sweeping statements about all
6 Internet shortcuts and all links and everything that existed in
7 1999. Each disclaimer in the file history is specific to a
8 given reference, and that's the way the disclaimer needs to be
9 analyzed, and that's the point I'm making.

10 THE COURT: Now I understand your point.

11 By the way, thank you. You may be excused.

12 THE WITNESS: Thank you, your Honor.

13 (Witness excused)

14 MR. REICHMAN: Your Honor, as a matter of
15 housekeeping, we have the proposed findings of fact and
16 conclusions of law, if you'd like us to hand those up.

17 THE COURT: That would be great, and let's talk about
18 that.

19 MR. REICHMAN: There's a hard copy and electronic.
20 I'm not sure how your Honor would like to proceed. If you
21 would like to hear some argument --

22 THE COURT: Yes.

23 MR. REICHMAN: -- can I impose on the Court for a
24 short break?

25 THE COURT: Sure. I'll see you in ten minutes.

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MR. REICHMAN: Thank you, your Honor.

(Recess)

THE COURT: It seems to me that there are two issues, apparently, although I thought there was only one. Issue No. 1 is the issue that I asked you to address, which was whether I should put a limitation on the core definition of the term "interactive link" as a result of disclaimers that appear in the file wrapper relating to -- is it capabilities; is that the word that you all use -- URL, cookie, hyperlink, bookmark. And the second issue, which was introduced this morning, which was a different issue, is the one that was alluded to just before we broke, which is the disclaimers are not, in fact, disclaimers at all, they are distinctions that are being drawn, addressed entirely to specific prior art references cited by the patent examiner, and that's all that these words in the file wrapper should be considered as. And I suppose what that means is statements that were made to the patent examiner were wrong, if, for example, the statement "which have no capabilities of acting as interactive links," the last one that we were looking at, turned out to be wrong and there turns out to be prior art, maybe not prior cited but something else that was in existence in 1999 in which a URL or a bookmark was capable of being used as an interactive link, that really goes to validity, and it shouldn't be definitional. So those are two separate issues.

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1 Can we talk about the definitional issue first?

2 MR. REICHMAN: Yes, your Honor. The definitional one
3 is the second one or the first one?

4 THE COURT: The first one.

5 MR. REICHMAN: Okay. I see these questions as coming
6 together, honestly, at some level.

7 THE COURT: All right.

8 MR. REICHMAN: As I see the first question, it's
9 whether the limitation should be included, the negative
10 limitation, proposed by defendants, and that question in the
11 analytical framework that the Court provided turns on whether
12 URLs have changed since 1999.

13 You heard the testimony today. I don't need to recast
14 it for the Court. I think there's a difference of opinion,
15 although it doesn't appear to be --

16 THE COURT: There's a difference of opinion.

17 MR. REICHMAN: It doesn't appear to be as deep as you
18 might think in that I think the experts agree that it may just
19 be semantics, terminology.

20 THE COURT: I don't think it's semantics. What I
21 heard wasn't semantic.

22 MR. REICHMAN: And I heard some suggestion, what I
23 heard from Dr. Shamos is that the uses of these URLs and the
24 other technologies in the disclaimer may have changed.

25 THE COURT: No. What he said was the definition of

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1 URL hasn't changed and the function of URL hasn't changed, but
2 people have found clever new ways to employ that function over
3 the course of the years. Indeed, I would be shocked if that
4 were not true.

5 MR. REICHMAN: And I think that's right, your Honor.
6 That's where I wonder whether that's just not a semantic issue,
7 that people have found clever new ways to use them is not
8 another way of saying that they have different capabilities
9 today, and this is where the issues come together. If these
10 URLs and other things had interactive links, as defined by the
11 Court and met with in the patent, in 1999, then that's the
12 motion for summary judgment of invalidity. That's not a claim
13 construction issue. If that's what was going on back then,
14 then that's a validity question.

15 The focus here today is the specific statements that
16 were made to the patent office in connection with these four --
17 Dickman, LeMole -- references that were made.

18 THE COURT: Right.

19 MR. REICHMAN: And I think that Dr. Shamos said it
20 there towards the end. I wouldn't phrase it the same way, but
21 the point, I think, is the same. He said if the art didn't
22 have these things, you wouldn't need a disclaimer; they would
23 just be distinguishing the art. To put it simply, that's what
24 we're trying to say. This is not disclaimers. This is merely
25 distinguishing the art. And I said it a different way at the

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1 beginning, your Honor. I said you can't disclaim something
2 that you haven't claimed in the first place. The point of a
3 disclaimer is you say, Okay, here's what's within the patent,
4 somebody comes along and says, No, no, look at this prior art.
5 This prior art would be within your patent, so you carve off a
6 piece of that limitation and say I'm going to disclaim a piece
7 of that limitation.

8 According to the patentee, according to these very
9 specific disclaimers, interactive links were not in these four
10 prior art references. That was the point. It was never
11 claimed in the first place, so it can't be a disclaimer, and
12 the Federal Circuit has made that point. There are cases to
13 that point, the proposition that a disclaimer is in the context
14 of a statement that narrows a claim. That's what constitutes
15 prosecution history disclaimer. There's no need for a
16 disclaimer where the court's construction already eliminates
17 the possibility of recapture. And I think that is what was
18 animating the defendant's arguments and the Court's concerns in
19 these claim constructions, the fear of recapture. You can't go
20 disclaim something in the prior art and say you're not that and
21 then turn around and claim that there is infringement of that
22 same thing.

23 I think that there's Federal Circuit precedent,
24 Schindler and the other cases that we cited stand for the
25 proposition that there isn't a risk of recapture when the

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1 Court's definition does the job. The definition of interactive
2 link, if the facilities for restoring prior operating state
3 within the Court's definition existed in the prior art the
4 patent's invalid. Then we move on to infringement, if those
5 facilities are not there, if all that's there is the prior art
6 that didn't have those facilities, then there's not going to be
7 any infringement on the infringement. It's all dealt with with
8 bedrock principles of patent law. It's double dipping to say I
9 understand that you distinguish the prior art by saying it
10 didn't have the facilities for restoring previous operating
11 state, so I'm going to put that in there, plus I'm going to
12 also say that you're not the prior art. That's the way it was
13 distinguished in the first place.

14 In connection with this, I think that the argument
15 might be made, I think your Honor made it in one of the Court's
16 ruling, saying what's the harm of it, sort of the gist. If you
17 were disclaiming these things what's the harm.

18 THE COURT: Did I say that, what's the harm of it?

19 MR. REICHMAN: You said something along those lines;
20 that's the way I took it. I'm probably being a little
21 interpretive. If you're not these things, then why not just
22 simply disclaim them. In addition to the law I just cited, I
23 think the issue is jury confusion. This is why negative
24 limitations are generally not favored by the Federal Circuit,
25 and to have the jury try and figure out it's not a URL, so

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1 which part of URLs were around in 1999, are they citing URLs
2 from today, or are they citing URLs from 1999, the errata sheet
3 demonstrates the opportunity for confusion, even among experts,
4 showing the page from 2007, which really means what they wanted
5 from 1999, because I think I'm not going out on a limb to say
6 that we can't -- we can't as lawyers and the Court -- be
7 pointing to evidence of how URLs operate in 2014 to invalidate
8 this patent. That doesn't make any sense.

9 The whole structure of the invalidity argument has to
10 be around prior art, not 2014 art, and to have the jury looking
11 at it can't be a URL, which URLs can't it be, can't be a URL
12 today, can't be a URL back in the day, and the point was it's
13 not necessary because what's necessary for proving infringement
14 is it's got an interactive link; that is, it has facilities for
15 restoring a previous operating state.

16 You've heard testimony from Dr. Martin, and I think
17 you can read it in the prosecution history just as well as
18 Dr. Martin, that the applicant's point of view is that these
19 prior references did not have interactive links, merely
20 distinguishing those prior references, and there's no need for
21 a disclaimer in that context.

22 Thank you, your Honor.

23 MR. SHATZER: Your Honor, we believe you were correct
24 when you initially found these were clear disclaimers. For
25 example, one of them is Internet shortcuts do not represent

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1 interactive link. If they were just distinguishing Dickman,
2 for example, they would have said the URL in Dickman is not
3 what's claimed in our patent. That's what patent lawyers do
4 all the time. These are written in the traditional language of
5 disclaimers. They're written broadly, and maybe they're
6 broader than they need to be, but the Federal Circuit has told
7 us that that's Droplets's problem. If you look at USHIP
8 Intellectual Props., LLC v. United States, 714 F.3d 1311, just
9 from last year's Federal Circuit, the Federal Circuit said,
10 "The fact that the applicant may have given up more than is
11 necessary does not render the disclaimer ambiguous. The
12 analysis focuses on what the applicant said, not whether or not
13 the representation was necessary or persuasive."

14 In other words, they're stuck with what they said.
15 And why is that? Because this Court and my clients and the
16 public shouldn't have to figure out what the disclaimer means.
17 They should be able to take it at face value. Or, to put it
18 another way, this Court doesn't have to go through each piece
19 of prior art they distinguished and figure out just how much
20 disclaimer they needed to have to get around that art and limit
21 the disclaimer to that, which is what they're suggesting is the
22 test.

23 THE COURT: Actually, what they're suggesting is that
24 by citing Dickman, the argument that I understand them to be
25 making is we distinguish three pieces of prior art.

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1 Distinction No. 1 was Dickman. Distinction No. 2 was, I forget
2 the name of it, and distinction No. 3 is LeMole. And all we
3 were doing in these three segments of our presentation to the
4 PTO was addressing the patent that was cited in the parentheses
5 there. We weren't making broad, sweeping statements, we were
6 addressing that patent. And you don't have to go look at the
7 patent to see how narrow we would have to be in order to
8 distinguish it. All we're doing here, when we're citing
9 Dickman and those two paragraphs, is we're distinguishing
10 Dickman and when we're citing LeMole and these three
11 paragraphs, we're distinguishing LeMole. That's the argument
12 they're making today.

13 MR. SHATZER: And if you look through the rest of the
14 prosecution history, when they wanted to say that, they said it
15 differently. They said we don't have the XYZ in reference PDQ.
16 They don't make broad, sweeping statements like they make here.
17 As your Honor noted earlier, these statements are not
18 qualified. Putting in parentheses isn't qualifying that
19 statement. When you read these, your Honor, in your initial
20 decision, you viewed them as clear disclaimers. That's how we
21 read them. That's what the Federal Circuit says you ought to
22 do. I think their point is we didn't need to disclaim that
23 much, and what the Federal Circuit said is so what, you did.

24 THE COURT: I understand that. I know that rule. So
25 the issue is do I continue, in light of the arguments that are

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1 now being made, the testimony I heard, whatever, to read them
2 as disclaimers or do I change my mind, and say they're trying
3 to distinguish these three patents here and anyway the whole
4 issue will come up on the inevitable summary judgment motion to
5 invalidate the patent on the ground that you could restore
6 prior operating states in 1999 through the use of interactive
7 links. That's what bookmarks did. I assume you're making that
8 motion.

9 MR. SHATZER: Depending on what your Honor rules, we
10 may very well. Depending on the definition of interactive
11 link, yes, we may very well.

12 THE COURT: I don't think that my interpretation of
13 interactive link probably has much of anything to do with
14 whether you have made that motion or not. At least it wouldn't
15 if I were litigating, but I'm not the litigator.

16 MR. SHATZER: In fact, your Honor, I think our motion
17 at this point would be for noninfringement.

18 Your Honor, just to summarize, you have to take these
19 at face value. It doesn't matter what the art said. They are
20 clear disclaimers. The Federal Circuit's told us that you're
21 stuck with what you said, even if you said too much.

22 Another important case, your Honor, is the Biogen
23 case. The Biogen case actually has some facts very similar to
24 ours. It's a biotechnology case, but situation was this.
25 Somebody was prosecuting a patent for an antibody and they

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1 limited their claim by saying that the antibody only attached
2 to the large loop of the antigen protein chain, and then, lo
3 and behold, somebody, Smith-Kline, made an antibody that
4 attached to the small loop and Biogen sued them, and
5 Smith-Kline said you limited your claim to the large loop.
6 Biogen's response was we didn't know about the small loop,
7 nobody knew that at the time. The court said it doesn't
8 matter. If you disclaimed, you disclaimed. Same facts here.
9 Something happened later, if your disclaimer is broad enough to
10 cover what happened later, that's your problem. That's the
11 facts of Biogen, very close to our facts, your Honor.

12 Just to summarize the testimony, and I don't think I
13 need to say too much because I think Dr. Shamos was very clear,
14 but the point is that the meaning and material capabilities of
15 URLs, bookmarks, hyperlinks, cookies, shortcuts hasn't changed.
16 The uses have changed, but they could have been put to those
17 uses earlier based on how they function. It was just a
18 question of whether there was a need for it or somebody thought
19 of it or somebody decided to do that. That's different.
20 That's true with everything, frankly.

21 THE COURT: I understand, it's true with everything.
22 It's certainly true with automobiles. But that's why I'm
23 wondering why your focus isn't on invalidity, but okay. That's
24 why I'm not a patent lawyer. I'm just a judge.

25 MR. SHATZER: To be specific, the one example that

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1 they focus on is this use of fragment identifiers, and those
2 fragment identifiers were available before 1999 and they didn't
3 do anything different in the example they used in 2005 than
4 they did in 1999. Nobody used them in that particular way, but
5 the way they worked was the same exact way and they were part
6 of that standard. Somebody had to go in and say we want to
7 have something called a fragment identifier. You identify with
8 a panel. Afterwards you have to put certain information in
9 there, and that was pre-1999, and people had used them for all
10 sorts of different things. All they've done is picked one
11 later on and said it's a big change because it works better,
12 but that has nothing to do with what a URL is. Has nothing to
13 do with what it means or its capabilities. It was capable of
14 doing that in 2000, 1999.

15 THE COURT: To help me clarify, let's say I agree with
16 you. Let's say I think that this argument that there's been
17 some change in the meaning or the capability as opposed to the
18 use to which URLs, fragment identifiers, bookmarks, what have
19 you, have been put over the course of time, is that ultimately
20 a definitional issue, or is that a validity issue?

21 MR. SHATZER: I think, because we have a disclaimer
22 here, it's a definitional issue.

23 THE COURT: And what if I decide that it's not, that
24 there's no disclaimer, that this is simply distinguishing? If
25 I were to decide that, does the issue drop out of the case, or

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1 does it then become a validity issue?

2 MR. SHATZER: I think with respect to this particular
3 term, even if it drops out, it remains both a noninfringement
4 and a validity issue.

5 THE COURT: How your stuff works as opposed to how
6 their stuff works, I haven't thought about. It's easier for me
7 to think about invalidity than it is to think about
8 infringement because I don't know how your product works except
9 that the screen shows me the picture, I press the hyperlink,
10 the screen shows me a different picture.

11 MR. SHATZER: Understood. But, your Honor, if you're
12 rethinking whether there was a disclaimer, I would urge you to
13 look through the rest of the document.

14 THE COURT: I am rethinking it.

15 MR. SHATZER: And look how they distinguish as opposed
16 to how they disclaim, because they do it very differently.

17 THE COURT: And that would be a useful thing to have
18 pointed out to me.

19 MR. SHATZER: And the other thing, I think, that would
20 be helpful, and the reason we think this disclaimer is
21 important is because the reason they're fighting against it is
22 we believe that they want to accuse of infringement saying that
23 we're in the prior art, and we want that to not happen because
24 it shouldn't because they disclaim that, and that's why they're
25 fighting so hard for this, your Honor.

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1 THE COURT: Everybody's fighting hard for it because
2 you want to win the case at the definitional stage. I wasn't
3 kidding when I said that. I've been around this track before.
4 This is not the first time I've had people come in here
5 slugging at the definitional stage to try to deliver the
6 knockout blow to end the case one way or the other.

7 MR. SHATZER: One reason we're struggling here,
8 frankly, we don't know what they claim to be the interactive
9 link in our client's product. They point to a bookmark, but we
10 don't know what the URL is in that bookmark. We don't know how
11 it works. We don't know what they're accusing. We want this
12 claim term to be as clear as possible, based on their own
13 statements, so that we can understand what we're being accused
14 of and what this claim does and doesn't cover. This
15 interpretation is real important to both infringement and
16 validity.

17 THE COURT: Yes?

18 MR. REICHMAN: Very briefly, I think the framing of
19 the issue as between validity infringement versus definitional,
20 I think, is the point that we're trying to make, so I won't
21 belabor it. That is the point. These are validity and
22 infringement arguments. Droplets is not trying to hit a
23 knockout blow and trying to avoid having the definitions
24 preempt the entire infringement and validity analysis.

25 The only thing I'd point the Court to, for the sake of

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1 brevity at the end of the day, is that these disclaimers we're
2 looking at, for example, if you look in the prosecution
3 history, the one we were looking at on the board, page 39 of
4 the slides, where we had Dickman in parentheses, that debate,
5 the title of that section was No. 1, what we were looking at,
6 but the title of the section issue B, rejection of claims thus
7 and so as being unpatentable over Gish in view of ICE-T.

8 THE COURT: That's not on this screen, you see. What
9 you're reading is not on the screen. You're the one that came
10 up with the screen shot, and that's not what it says. You have
11 "Internet shortcuts do not represent an interactive link."
12 That title is very broad and very general and suggests that you
13 are disclaiming, that's certainly how I read it originally,
14 that you are disclaiming the notion that Internet shortcuts,
15 like bookmarks, are the interactive link that is referenced in
16 your patent.

17 MR. REICHMAN: You're right.

18 THE COURT: And bookmark is an interactive shortcut.
19 That is an Internet shortcut. That's what it is. And I have
20 to tell you, if I had to rule this second, the definition of
21 bookmark has not changed.

22 MR. REICHMAN: And, your Honor, because that is what
23 the slide says is why I wanted to make this one more point at
24 the end of a long day, it's in the record, it's in Exhibit KK
25 of the plaintiff's submission, I've put it up on the Elmo, the

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1 section, and this is similar, the same as dealt with in the
2 other section, four different sections that are cited, it's
3 clear from the context, and that's what the Federal Circuit
4 says you have to look at, that what is being distinguished,
5 what is being discussed are these prior art references. Nobody
6 mischaracterizes the teaching of Dickman in support of the
7 assertions, and it goes on to explain why Dickman is
8 distinguished from the patent claims.

9 Dickman did not have an interactive link. That's the
10 point. Gish did not have interactive link. ICE-T did not have
11 an interactive link. It's distinguishing the prior art. So if
12 the prior art did have those things and the patentee was wrong,
13 that's a motion for summary judgment of invalidity, and if the
14 accused products, at the end of the day, don't have anything
15 more than these unadorned prior art concepts -- that is, no
16 interactive link -- then it's a motion for noninfringement.
17 This is not to be dealt with definitionally without the fullness
18 of seeing what's actually at issue.

19 Thank you, your Honor.

20 MR. SHATZER: I don't have anything else, your Honor.

21 THE COURT: Okay. This was fun. It was, actually.

22 You have no idea how we spent the rest of the week. Thank you
23 very much. I'll try to get something out in the next ten days.

24 MR. REICHMAN: Thank you, your Honor.

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